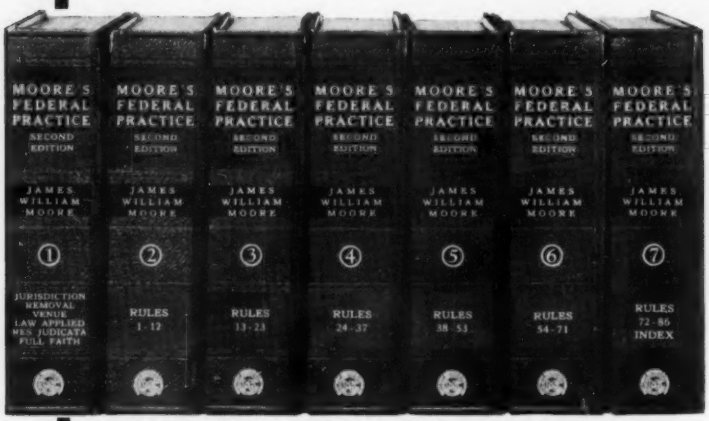
Journal

December 1954



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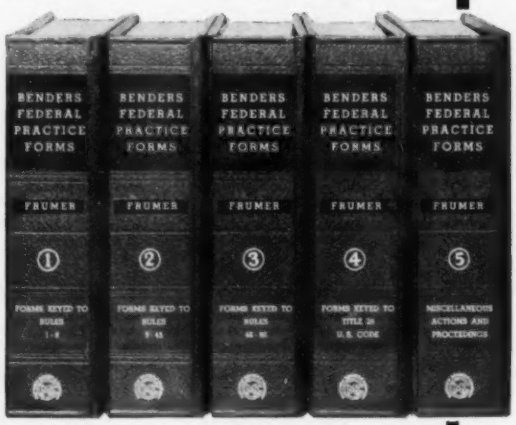

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DECEMBER, 1954

THE AMERICAN BAR ASSOCIATION JOURNAL is published monthly by the AMERICAN BAR ASSOCIATION at 1155 East Sixtieth Street, Chicago 37, Illinois
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The President's Page

Loyd Wright

■ Many have asked about the progress of the American Bar Research Center and the structure of the Foundation.

Among other purposes, the American Bar Foundation was organized "to promote the study of the law and research therein" and "to maintain a law library and research center". Now that the new home for the Bar has been completed in Chicago, the major activity of the Foundation is the development of the American Bar Research Center.

The officers of the Foundation are the same as those of the Association. Its Directors consist of these officers and three additional members chosen from the Association's Board of Governors. The latter three Directors constitute the Executive Committee of the Foundation.

Although the Foundation and the Association are thus closely related, the activities of the Foundation are necessarily limited by the character of its organization as a corporation not for profit, authorized to accept tax-exempt contributions to carry on its work. During the current administrative year, William J. Jameson, immediate past President of the Association, is serving as Chairman of the Executive Committee. John C. Cooper has been named as Administrator.

The Research and Library Committee of the Foundation, subject to the Board of Directors, has general supervision of the Research Center. Its present chairman is Robert G. Storey. As Mr. Storey said at the dedication last August, "our Research Center will have as its function the *systematic* consideration and implementation of the legal research projects recommended by the House of Delegates and the various organized bar associations. We do not intend to compete with any law school or other institution already engaged on specific legal projects. The projects we do sponsor will be concerned with the long-range objectives of the American Bar Association and with public law questions."

Important Foundation research projects have already been approved. A long-range study of the administration of criminal justice in the United States has been planned under the sponsorship of a Special Committee which was originally headed by the late Mr. Justice Robert H. Jackson. His untimely death was a great loss to our Research Center, as he was also an active member of the Research and Library Committee. I am now pleased to announce that the distinguished lawyer and citizen, William H. Donovan, head of the Office of Strategic Services during World War II, has agreed to take the chairmanship of the special committee and carry forward that part of Mr. Justice Jackson's work for the Bar.

Other approved research projects include the following: a study of the Canons of Professional Ethics, which may end in a new statement of standards of legal and judicial conduct; the annotation of the Model Corporation Act and the Model Non-Profit Corporation Act, as originally drafted by the Committee on Corporate Laws of the Section of Corporation, Banking and Business Law; the preparation of a documentary source book of American freedoms; cooperation with the Commissioners on Uniform State Laws in research required by their program; implementation of part of the work of the Survey of the Legal Profession, including a new lawyer census to be completed in 1955 through Martindale-Hubbell.

The Research Clearing House is another major project already under way. Its purpose is to give information as to the subject matter and location of unpublished legal research work in American law schools. With the generous cooperation of the heads of these great institutions, the Research Center has already assembled, classified and published a master list and one supplement containing in all reference to over 2,000 separate research items.

The library being assembled at the Research Center will be unique. While it will contain a working library for reference use of the research staff not larger than the libraries of leading law firms, the major collection will consist of bar association materials. When this library has been assembled, bar associations and members of the Bar generally will have available reports, studies, addresses, proceedings and other similar data which it is felt will be most useful for future coordination and efficiency of bar activities.

It is hoped and believed that the American Bar Research Center will soon become a dynamic force in fostering the welfare of the entire Bar throughout the Nation.

We at Headquarters wish you all a Happy Holiday season and pray with you for peace in 1955.

American Bar Association Journal

the official organ of the

AMERICAN BAR ASSOCIATION

published monthly

The objects of the American Bar Association, a voluntary association of lawyers of the United States, are to uphold and defend the Constitution of the United States and maintain representative government; to advance the science of jurisprudence; to promote the administration of justice and the uniformity of legislation and of judicial decisions throughout the nation; to uphold the honor of the profession of law; to apply its knowledge and experience in the field of the law to the promotion of the public good; to encourage cordial intercourse among the members of the American Bar; and to correlate and promote such activities of the Bar organizations in the nation and in the respective states as are within these objects, in the interest of the legal profession and of the public. Through representation of state, territory and local bar associations in the House of Delegates of the Association, as well as large membership from the Bar of each state and territory, the Association endeavors to reflect, so far as possible, the objectives of the organized Bar of the United States.

There are seventeen Sections for carrying on the work of the Association, each within the jurisdiction defined by its by-laws, as follows: Administrative Law; Antitrust Law; Bar Activities; Corporation, Banking and Business Law; Criminal Law; Insurance Law; International and Comparative Law; Judicial Administration; Labor Relations Law; Legal Education and Admissions to the Bar; Mineral Law; Municipal Law; Patent, Trade-Mark and Copyright Law; Public Utility Law; Real Property, Probate and Trust Law; Taxation; and the Junior Bar Conference. Some issue special publications in their respective fields. Membership in the Junior Bar Conference is limited to members of the Association under the age of 36, who are automatically enrolled therein upon their election to membership in the Association. All members of the Association are eligible for membership in any of the other Sections.

Any person who is a member in good standing of the Bar of any state or territory of the United States, or of any of the territorial groups, or of any federal, state or territorial court of record, is eligible to membership in the Association on endorsement, nomination and election. Applications for membership require the endorsement of a member of the Association in good standing and are considered in each case by a Committee on Admissions of the appropriate state. If the applicant is a member of the Bar of the state or territory in which he resides or has his principal office, or is a member of a federal, state or territorial court of record of a state or territory in which he resides or has his principal office, the application is referred to the Committee on Admissions for one of such states or territories. If, however, the applicant is not a member of the Bar of the state or territory in which he resides or has his principal office, the application is referred to the Committee on Admissions for one of those states or territories or is referred to the Committee on Admissions for a state or territory in which the applicant formerly resided and to the Bar of which he was admitted. Upon the approval of an application by a majority of the proper Committee on Admissions, an applicant is deemed nominated for membership. All nominations made pursuant to these provisions are reported to the Board of Governors for election. Four negative votes in the Board of Governors prevent an applicant's election.

Dues are $16.00 a year, except for the first two years after an applicant's admission to the Bar, the dues are $4.00 per year, and for three years thereafter $8.00 per year, each of which includes the subscription price of the JOURNAL. There are no additional dues for membership in the following Sections: Bar Activities, Criminal Law, Judicial Administration, Legal Education and Admissions to the Bar, and the Junior Bar Conference. Dues for the Section of Administrative Law, the Section of Antitrust Law, the Section of Labor Relations Law and the Section of Patent, Trade-Mark and Copyright Law are $5.00 a year; dues for the Section of Taxation are $6.00 a year; dues for all other Sections are $3.00 a year.

Blank forms of proposal for membership may be obtained from the Association offices at 1155 East Sixtieth Street, Chicago 37, Illinois.

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Views of Our Readers

• Members of our Association are invited to submit short communications expressing their opinions, or giving information, as to any matter appearing in the *Journal* or otherwise within the province of our Association. Statements which do not exceed 300 words will be most suitable. The Board of Editors reserves the selection of communications which it will publish and may reject because of length. The Board is not responsible for matters stated or views expressed in any communication.

A Suggestion for Preventing "Trial by Newspaper"

■ In the October, 1954, issue, the article "Fair Trial and Free Press" presents the difficult question, apparently not yet solved, as to how the courts can avoid the effects of newspaper reports of purported confessions, trial by newspaper and related difficulties incident to ensuring a fair criminal trial.

The difficulty seems to be that since the Constitution guarantees freedom of the press and freedom of speech, no effective remedy exists to obviate the very evident effect of publication of confessions, trial by newspaper, and similar matter.

The article "Pickets or Ballots" in the same issue may possibly provide a solution to the problem. That article brings out the solution found by the courts to control picketing, namely, by looking to the *purpose* of the picketing. That is, the courts will issue an injunction to restrain picketing, an exercise of free speech and free press, if the purpose of the picketing is not a proper one.

Might not the courts likewise issue an injunction to restrain a newspaper from printing matter whose *purpose* is to prejudge an accused person, introduce sensationalism with a view to wider sales of the paper, as opposed to, let us say, the legitimate purpose of providing information to the public?

It would appear that any objection to issuance of such an injunction would apply with equal force to an injunction against picketing. Granted that difficult borderline cases would exist, as to newspapers, yet this is equally true of the activities of pickets.

EDWARD T. MACKIN
Flint, Michigan

Fair Trial vs. a Free Press

■ Relative to Mr. Otterbourg's article "Fair Trial and Free Press" [40 A.B.A.J. 838; October, 1954], perhaps the courts could handle the problem better also.

The accused has a right to a public trial in order to prevent or at least publicize "star chamber" type proceedings. Presumably the accused could waive this right if he is given a free and timely choice. This is to suggest that prior to trial the court ought to put the question squarely up to the accused: do you want a public trial or a private one, do you want photographers in the courtroom or not, even do you want television and radio or not? The accused could thus make his own election and would be bound by it.

What right does the public, *i.e.*, the press, have which supersedes that of the accused? It is submitted that there is none. The right of the press is to free publication and dissemination of information. This does not carry with it the right of free access to information even when it is charged with the public interest.

WILLIAM C. MCCOY, JR.
Cleveland, Ohio

A Letter that We Appreciate

■ The pressures on us since we came down here in January, 1953, have interfered with much of the reading I tried to keep up with while in practice in St. Paul. However, the JOURNAL is one item I rely on to keep abreast of what is going on in the profession. I find the JOURNAL increasingly stimulating and more and more measuring up to the needs of a great organization like the ABA.

From past experience with similar work it occurred to me that you and your associates of the Editorial Staff should be told that your excellent work is neither unnoticed nor unappreciated by the profession. I hope to be in Chicago within the next sixty days and if the schedule permits I will try to drop in for a visit.

WARREN E. BURGER
Department of Justice
Washington, D. C.

The Association's Role on Political Questions

■ On the question of action by the American Bar Association on public questions, there is a possible compromise view which might appeal to more of your members than either extreme. This is to recognize that such questions are properly within the jurisdiction of the Association, but to avoid them during periods when they are so surcharged with political attitudes that political attitudes are more likely to determine the outcome than is judicial lawyer-like consideration—or when the public is likely to think that that is the case.

Applied to the Bricker Amendment question, this policy would suggest that action on that subject might well be deferred if it comes up at a time when a large percentage of lawyers is so incensed over recent events that other lawyers and the public may doubt their ability to

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Views of Our Readers

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think as clearly as we hope is generally expected of lawyers. This does not mean that such admirable self-restraint by a majority should necessarily be exercised at times when there is an imminent danger to be combatted.

During the recent Annual Meeting, one of the American Bar Association's Sections found a method of handling such a problem. The debate and vote proceeded in the usual manner with political attitudes in the background. After a position had been approved, a majority member arose and said that he felt that the Section ought not to be bound by a rather close vote under the circumstances, and he moved to reconsider and recommit. There was no parliamentary objection and the motion carried.

Although it is true that our House of Delegates is a large, representative organization, having some resemblance to Congress, there is one big difference. We elect our congressmen primarily with political attitudes in mind. Do we want political attitudes to be even a factor, and perhaps a growing factor, in the election of our delegates to the House of Delegates?

This does not mean that the American Bar Association must necessarily remain mute on politically charged questions when there is no imminent danger. Certainly working out a sound, lawyer-like compromise would always be appropriate. (See suggestion on the Bricker Amendment by Rationalis, *Chicago Daily Law Bulletin,* August 13, 1954.)

One of our most sacred democratic principles is decision by majority vote. If there is any more noble concept in political philosophy, it is probably self-restraint by that majority.

The JOURNAL is a good place for articles taking different sides of public questions and written especially for lawyers. I am more sure to read them than any other type.

LOUIS ROBERTSON

Chicago, Illinois

He Likes "What's New"

■ May I put in a kind word for your most interesting section in the JOURNAL entitled "What's New in the Law". For people who, especially in the evening after a hard day, grow weary of wading through lengthy, involved, legal treatises, this type of article is a very welcome relief. In fact, one might go so far as to say it is relaxing because it is not only very readable but captures one's interest through its easy-going style. It should appeal to all lawyers regardless of specialties while at the same time containing a great deal of practical knowledge. It impresses me as a month-to-month summary of American law which keeps one abreast of trends in that enough background is supplied to bring out the significance of the decision over a period of time. My hat is off to Messrs. Rossman and Allen for their fine contribution. May it continue as in the past, viz., not too lengthy over-all, clear, concise, yet comprehensive and, above all, readable.

GODFREY K. PREISER, JR.

West Orange, New Jersey

A Footnote to Professor Mishkin's Article

■ Curiously enough, on the day that the August issue of the JOURNAL came into the office, I was thumbing through the writings of Thomas Jefferson on democracy edited by Saul K. Padover. I had just read Professor Mishkin's excellent article on "Prophecy, Realism and the Supreme Court".

Was I surprised to find that Jefferson had made a comment which may interest such readers as have not come across it:

> Another most condemnable practice of the Supreme Court to be corrected is that of cooking up a decision in caucus and delivering it by one of their members as the opinion of the court, without the possibility of our knowing how many, who, and for what reasons each member concurred. This completely defeats the possibility of impeachment by smothering evidence. A regard for character in each being now the only hold we can have of them, we should hold fast to it. They would, were they to give their opinions seriatim and publicly, endeavor to justify themselves to the world by explaining the reasons which led to their opinion. [Letter to Pleasants, 1821, page 65].

Whatever the merits of the position taken by the writer of the Declaration of Independence, Jefferson's remarks might be added as a footnote to Professor Mishkin's analysis.

FELIX F. STUMPF

Berkeley, California

Agrees With Mr. Broder

■ One of the most informative features of your superlative magazine is the "Views of Our Readers" section. I find it quite inspirational due to your judicious selectivity.

I especially enjoyed reading your September issue wherein appeared an ingenious letter by Kenneth F. Kelly, of the Illinois Bar. He out-

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Views of Our Readers

(Continued from page 1026)

lined a splendid argument for extension of social security to self-employed lawyers. We all know that Christianity has come a long way since the days of the Inquisition. So has the acceptance of the Federal Social Security legislation, because when it was first proposed it was popularly denounced as socialistic, communistic, etc. Today, it has become an accepted principle of our dynamic capitalistic system, and within a few years I feel certain the majority view in the legal profession will champion the extension of social security to self-employed lawyers.

The other letter I especially enjoyed was that of Simon Broder, of Washington, D. C., wherein he did a superlative job of negating the attack of R. Carter Pittman on Professor William W. Crosskey. I am amazed to note that Mr. Pittman follows the Senator McCarthy (Adolph Hitler) line—anyone disagreeing with him must be a Communist!

Mr. Broder makes the following shrewd and brilliant observation which is especially applicable to our blessed nation during these perilous times when we could liquidate our cherished free enterprise system if we resorted to dictatorship:

"I do not assert that judicial supremacy is not desirable or that legislative supremacy is preferable. I do say that a working democracy can be achieved with either. Obviously, history proves that executive supremacy is fatal to democracy."

JOHN E. SATO

Ravenna, Ohio

No Socialists in the Trojan Horse

■ Mr. George E. Morton must have had difficulty dictating the article "The Trojan Horse Inside Our Walls" [40 A.B.A.J. 135, February, 1954] with his tongue in his cheek. Perhaps he wrote the article in longhand.

If he is serious in every assertion he makes in a discursive statement, he must see the resemblance between his attitude and the philosophy of Emma Goldman and Alexander Berkman. It is because we regard the human being as a member of society that we have organized ourselves on the local, state and national levels into governmental groups for the advancement and protection of our inherent rights and our personal dignity. Mr. Morton seems to argue for states rights against federal action in matters of social security, but does not apparently appreciate that if governmental programs to protect people against industrial accident, unemployment and the hazards of old age constitute socialism, it should make no difference whether the state government or the Federal Government operates in these fields.

I get a big kick out of these people who argue that the government (state or federal) should not participate in the field of insurance for the retired earner because we are a republic and not a democracy. Not necessarily in the case of Mr. Morton, but in the case of too many others, scratch a philosopher who argues that this is a republic and not a democracy and you will find someone who has either been bitten (as Heywood Broun once said of Westbrook Pegler) by the income tax or by a bug that is hostile both to republicanism and democracy.

I see no socialism in the type of social security system which has been in effect about twenty years. I do see a threat of what happened in Russia and in Germany if we yield to the ministrations of people who do not like to be taxed for the benefit of all of the people. I wonder where Mr. Morton was during the restive days of the early thirties.

HARRY G. LIESE

New York, New York

Activities of Sections

SECTION OF BAR ACTIVITIES

■ Action taken by the Council and Section at Chicago included: a proposal to amend the by-laws to provide for the payment of dues by Section members; a vote to ask the Board of Governors for a room at the Annual Meeting headquarters in Philadelphia for the use of the Section in co-operation with the Conferences of Presidents and Secretaries for counseling and advice to officers of state and local bar associations; and a vote to offer the services of the Section individually but preferably in cooperation with the Conferences of Presidents and Secretaries at the regional meetings for the same purpose. The Council endorsed unanimously the idea of the American Bar Association's sending to all state and local bar association presidents and secretaries copies of the programs of the Section at the annual and regional meetings.

SECTION OF MUNICIPAL LAW

■ Following the Chicago meeting, the Section of Municipal Law through its Chairman, David M. Wood, has initiated committee activities for the coming months. It is urged that those members who have not indicated any preference for committee work do so as early as possible and become identified with the specific work of most interest to them.

In October, the chairman attended a meeting of all Section Chairmen of the Association held at the Shoreland Hotel and the new headquarters at 1155 East 60th Street, Chicago.

The editorial subcommittee of the Joint Committee on Urban Traffic and Parking met at the headquarters of the Eno Foundation, Saugatuck, Connecticut, October 23-24, and advanced the report of the interprofessional group on this major problem to the point where early publication is assured.

The legal aspects of highway improvements and highway development command the attention of an increasing number among the membership of the Section of Municipal Law. Close liaison is maintained with all professional groups so there may be a better understanding and correlation of studies without undue duplication in this large field.

SECTION OF TAXATION

■ T. Coleman Andrews, Commissioner of Internal Revenue, has requested that the Chairman of the Section of Taxation have the Section assist the Government in reviewing the proposed Regulations under the 1954 Internal Revenue Code. Pursuant to the request, Chairman Allan H. W. Higgins, of the Section of Taxation, appointed a Special Emergency Committee on Regulations for Policy and Coordination to supervise the work of reviewing the Regulations. Lee I. Park, of Washington, is the Chairman of the Committee, assisted by Eugene F. Bogan, Walter A. Slowinski, Scott P. Crampton, Lincoln Arnold, Seymour S. Mintz, F. Cleveland Hedrick, Jr., members of the Special Committee, all Washington lawyers active in the Section of Taxation.

The Chairmen of the Committees of the Section of Taxation, over thirty-five in number, were advised by Chairman Higgins as follows:

> As the new regulations are issued under H. R. 8300, any regulations coming within the scope of the activities of your Committee will be promptly referred to you, and it will be necessary for you to take immediate action so that a report can be made to the Internal Revenue Service within the thirty day protest period provided for with respect to regulations appearing in the Federal Register.

In some cases, because of the wide scope of the Committee's activities, the responsibility has been redelegated among Subcommittee Chairmen of the respective Committees.

The request of the Commissioner of Internal Revenue followed the monumental job of the Section of Taxation on the 1954 Internal Revenue Code. For a period of more than four years the committee chairmen and committees and officers of the Section of Taxation have been working in close co-operation with the Treasury and congressional committees and staffs on projects directly relating to the new Code. When H. R. 8300 was introduced into the House of Representatives, the Section of Taxation undertook the enormous job of analyzing the Bill. The culmination of its efforts was the appearance of Thomas N. Tarleau, Chairman of the Section of Taxation during this hectic period, before the Senate Finance Committee. As a result of the detailed work by the Committees submitted by Mr. Tarleau to the Senate Finance Committee, most of the recommendations of the Section were followed. The request of the Commissioner for the assistance of the Section of Taxation in reviewing the proposed Regulations from a standpoint of policy indicates again the great prestige which the Section has established before Congress, the Treasury and the Internal Revenue Service.

At last report, the Section had 4,538 members, an increase of nearly 1,500 members in the past two years. All lawyers interested in taxation who are members of the American Bar Association are encouraged to join the Section so that it may increase its many important activities.

The Internal Revenue Code of 1954:

A General Consideration

by Walter A. Slowinski • of the District of Columbia Bar

■ The Section of Taxation, working through an emergency committee and its committee chairmen, collaborated very closely with officials of the Treasury Department and with Congress during the legislative progress of the Internal Revenue Code of 1954. Through the hard work of the Tax Section representatives and the sympathetic consideration of the government officials, many recommendations previously made by the American Bar Association and the Section of Taxation are contained in the new Code. Walter A. Slowinski was formerly Secretary of the Tax Section and was an active member of the Section's Emergency Committee which had charge of presenting the Section's recommendations to Congress and the Treasury Department.

■ For the past few months the Bar and the public have been deluged with explanations of the Internal Revenue Code of 1954, Public Law 591, 83d Congress. By radio, television, newspapers, legal periodicals and tax institutes, the taxpayer and his lawyer have been instructed in the provisions of the new law.

This series of tax articles in the AMERICAN BAR ASSOCIATION JOURNAL is not designed to compete in any way with other educational media. It was the thought of the Section of Taxation that a series of concise articles be prepared by the Section officers, committee chairmen and other members who worked closely with the congressional tax-writing committees and the Treasury Department and their staffs during the past two years which will cover only the Code provisions of everyday importance to lawyers in general practice. None will purport to be an over-all summary of a particular portion of the Code and all will be designed to give helpful practical explanations of new provisions affecting taxpayers and their legal advisers. This article will describe the background of the 1954 Code and briefly survey its purpose and coverage.

Work on the Internal Revenue Code of 1954 had been under way for many years but the immediate project began in the spring of 1952 when questionnaires were sent out to the press by Colin F. Stam, Chief of Staff of the Joint Committee on Internal Revenue Taxation. The questionnaire asked for suggestions for improvements in the revenue laws and their administration. In geometrical progression copies were reproduced by groups of interested professional, farm and business associations, companies and individual taxpayers.

The 17,000 replies to the questionnaire, together with informal Joint Committee on Internal Revenue Taxation Staff conferences with professional and business groups, were instrumental in the preparation of the list of forty topics later considered by the House Ways and Means Committee.[1]

During June, July and August, 1953, the House Ways and Means Committee heard 504 witnesses and considered more than 1,000 carefully prepared statements supporting improvements in specific provisions of the revenue laws.[2] Every taxpayer had a fair and equal opportunity to testify or file a statement. This clear and impressive demonstration of the taxpayer's right to petition Congress became the foundation on which the Internal Revenue Code of 1954 was built.

From January 13, 1954, to March 9, 1954, the Ways and Means Committee sat in executive session, and on March 9, 1954, it favorably reported out H. R. 8300.[3]

Under a closed rule the House of Representatives passed H. R. 8300 on March 18, 1954, and sent it to the Senate for consideration. The Sen-

1. See "Preliminary Digest of Suggestions for Internal Revenue Revision Submitted to the Joint Committee on Internal Revenue Taxation", Joint Committee Print, April 21, 1953, U. S. Government Printing Office, Washington 25, D. C.

2. Hearings before the Committee on Ways and Means, House of Representatives, 83d Cong., 1st Sess., on "General Revenue Revision" Four volumes, U. S. Government Printing Office, Washington 25, D. C.

3. H. R. 8300, 83d Cong., 2d Sess, Union Calendar No. 498, and H. R. Rep. No. 1337, 83d Cong., 2d Sess.

ate Finance Committee held hearings during April, 1954, at which 130 witnesses testified and 420 statements were submitted for the record.[4] Again, every taxpayer had an opportunity to file a statement for the Committee's consideration, and as many witnesses were heard as time would permit.

After five weeks of regular executive sessions, the Finance Committee favorably reported H. R. 8300 with amendments to the Senate on June 18, 1954.[5] Because no further open hearings on H. R. 8300 were held before it was voted upon by the House of Representatives, many necessary changes, as well as purely technical corrections, had to be made by the Finance Committee after its hearings. As a matter of record, 553 changes in the House version of H. R. 8300[6] went to conference after the Senate passed H. R. 8300, as amended, on July 2, 1954.[7]

The Senate and House conferees reached agreement on Senate amendments to H. R. 8300 on July 26, 1954.[8] It is interesting to note that of the 553 amendments recommended by the Senate Finance Committee, only ten were not accepted in full, while sixteen others introduced on the Senate floor were rejected.

The House of Representatives agreed to the conference report on July 28, 1954, by vote of 316 to 77, and the Senate on July 29, 1954, by vote of 61 to 26. To clear up numerous technical discrepancies the House and Senate later passed House Concurrent Resolutions Nos. 263 and 268, authorizing and directing the enrollment clerk to make necessary changes in H. R. 8300 before it was sent to the President for signature.

President Eisenhower signed the 984-page bill into Public Law 591 of the 83d Congress on August 16, 1954.

It will be recalled that for many years the American Bar Association has recommended extensive revenue changes to the Congress, and these were incorporated into separate bills introduced in 1951 by Representatives Daniel A. Reed, of New York, and A. Sidney Camp, of Georgia.[9]

These American Bar Association recommendations and others were called to the attention of the House Ways and Means Committee during the over-all revenue revision hearings in June, July and August, 1953,[10] when the representatives of the Section of Taxation appeared to testify or file statements on thirty-one topics on behalf of the Association.[11] Again, on April 8, 1954, Thomas N. Tarleau, Chairman of the Section of Taxation, appeared as the first public witness before the Senate Finance Committee to present the recommendations of the American Bar Association.[12] This testimony represented the studies and efforts invited from more than 4,000 members of the Section of Taxation, carefully analyzed and condensed as a full appraisal of H. R. 8300 in the light of the Association's resolutions.

A very large percentage of the recommendations made by the Tax Section of the American Bar Association were included in H. R. 8300, and representatives of the Treasury Department, the legislative staffs and members of Congress expressed appreciation for the assistance rendered by the American Bar Association.

The Contribution of the American Law Institute

The work of the American Law Institute Income Tax Project to improve the technical provisions of the Internal Revenue Code of 1939 was most important and helpful in the preparation of H. R. 8300. By a critical examination and revision of the provisions of the Internal Revenue Code of 1939, the American Law Institute has been preparing a proposed "Federal Income Tax Statute" for the past several years. These tentative drafts of income, estate and gift tax revisions[13] were made available to interested tax groups, legislative committees and their technical staff members.

Many of the lawyers working on the American Law Institute model income tax statute were members of the Tax Section of the American Bar Association, familiar with the recommendations of the Section, and many of these recommendations were incorporated in the proposed federal income tax statute.

The American Law Institute proposals were adopted in many instances in the new law in the estates and trusts, partnerships, and corporate distributions and adjustments sections, and the excellent work of overhauling and improving the new tax provisions will continue under Director Herbert F. Goodrich, of Philadelphia, and the two Income Tax Project reporters, Stanley S. Surrey, of the Law School of Harvard University, and William C. Warren, Dean of the Columbia University School of Law.

The work of the American Bar Association, the American Law Institute and thousands of associations, groups, companies and individual taxpayers was most rewarding. Out of the months of effort by congressional and Treasury Department officials and their staffs, co-operating with taxpayer groups, came the "first comprehensive revision of the

4. Hearings before the Committee on Finance, U. S. Senate, 83d Cong., 2d Sess., on "H. R. 8300—The Internal Revenue Code of 1954", four volumes, 2443 pages, U. S. Government Printing Office, Washington 25, D. C.

5. H. R. 8300 Amendments, 83d Cong., 2d Sess., Calendar No. 1635, and Sen. Rep. No. 1622, 83d Cong., 2d Sess., Union Calendar No. 1635.

6. A comparative summary of the important changes are presented in "Internal Revenue Code of 1954—Comparison of the Principal Changes made in the 1939 Code by H. R. 8300 after action by House, Senate and Conference" August 13, 1954, compiled by the staffs of the Joint Committee on Internal Revenue Taxation and the Treasury Department, one volume, forty-eight pages, U. S. Government Printing Office, Washington 25, D. C.

7. Senate engrossed amendments are contained in H. R. 8300 Amendments, 83d Cong., 2d Sess., dated July 2, 1954, 418 pages.

8. H. R. Rep. No. 2543, 83d Cong., 2d Sess., July 26, 1954.

9. H. R. 4775 and H. R. 4825, 82d Cong., 1st Sess.

10. *Supra*, note 2.

11. See House Hearings, *supra*, note 2, pages 8-11, 146-148, 225, 226, 295, 296, 327, 354, 355, 375, 376, 404, 405, 431-437, 598, 654, 655, 929-932, 1079-1085, 1242, 1243, 1253, 1254, 1273, 1316-1320, 1355-1358, 1368-1386, 1569-1570, 1791-1795, 2901, 2902.

12. Senate Finance Committee Hearings, *supra*, pages 325-495.

13. Tentative Drafts Nos. 1-9, Federal Income, Estate and Gift Tax Statute, The Executive Office, The American Law Institute, 133 South 36th Street, Philadelphia, Pennsylvania.

internal-revenue laws since before the turn of the century and the enactment of the income tax".[14] It is interesting to note that since the codification of our revenue laws in 1939, only fifteen years ago, Congress has enacted 200 internal revenue statutes, including fourteen major revenue acts.[15]

Physical Aspects of the New Code

The 929 pages of Public Law 591, exclusive of the table of contents and cross-reference tables, have been drafted to eliminate many of the unpopular features of the 1939 Code. A more logical sequence of topics has been achieved, and subjects have been treated in adjacent sections of the law where possible, minimizing the need for consulting remote provisions for further references.[16] A new table of contents has been prepared to guide taxpayers and their lawyers through the logical sequences of income tax, estate and gift taxes, miscellaneous excise taxes, procedural and administrative provisions, etc.

Obsolete material, grown meaningless over the years, has been removed from the new Code provisions by painstaking legislative draftsmanship. In the same process another objective, simplification of language, has been achieved in some measure, although some critics believe the simplification project has not met with complete success.[17]

A major physical change of much help to the average lawyer who does not have the opportunity to stay current on all tax procedural matters is the consolidation of all administrative and procedural provisions in Subtitle F (Sections 6000 *et seq.*) of the Code. Taxpayers will now find in one place all the administrative provisions covering filing of returns, payment of tax, credits, refunds, interest and penalties. This comes as a relief to those who wandered endlessly through the 1939 Code in search of this type of information.

The new Code comes complete with cross-references to itself and to the 1939 Code to overcome the necessary transitional problems.[18] The first cross-reference table shows the 1939 Code provisions referenced to the 1954 Code sections; the second table references 1954 provisions to 1939 sections; and the third table lists cross-references within the 1954 Code. Much more information along these lines will no doubt be made available by private legal reporting services in their 1955 tax publications.

Substantive Objectives of the 1954 Code

One of the early popular misconceptions was that Public Law 591 was designed to be a "tax reduction" measure. Over the constant explanations of the Chairmen of the House Ways and Means Committee and Senate Finance Committee to the contrary, the opposition insisted that taxes for all classes should be reduced equally or for the smaller income taxpayers first.

The over-all revenue revision project was never meant to be a general tax-reduction measure. It was designed to remove inequities in then-existing laws, the benefits of correction of errors to fall where fair and just. A primary objective was the ending of harassment of taxpayers and the reduction of barriers to future expansion of production and employment.[19]

In the category of ending harassment of taxpayers, attention is invited to the improved provisions relating to the surtax on improperly accumulated earnings, now called the "accumulated earnings tax" in Sections 531 to 537 of the new law;[20] revised accounting provisions which bring tax accounting into closer harmony with generally accepted accounting principles;[21] and the clarifications in the corporate distribution and adjustment provisions.[22]

Swann Studio

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The new provisions designed to reduce the barriers to future business expansion and provide incentive to economic growth include:

(1) New allowable depreciation methods;[23]

(2) Partial relief from the double taxation of dividends;[24]

(3) New option to capitalize or expense research and development expenditures;[25]

(4) New capital gains treatment for sales of patents;[26]

(5) New provision allowing farmers to expense certain soil and water conservation expenditures;[27]

(6) New and increased rates of depletion for some minerals and inclusion of new minerals.[28]

14. H. R. Rep. No. 1337, *supra*, at 1. Some well-earned credit, however, should again be given publicly to the officials who codified the revenue laws fifteen years ago in the Internal Revenue Code of 1939.

15. Statement by Senator Millikin, Cong. Record, June 28, 1954, at 8636.

16. As an example, depletion provisions, formerly found in Sections 23(m) and 114(b) of the 1939 Code, have now been consolidated in Sections 611-613 of the 1954 Code.

17. The necessarily intricate provisions of Subchapters C, J and K of Chapter 1, covering corporate distributions and adjustments, estates and trusts, and partnerships, respectively, have been most often chosen to support this point.

18. Public Law 591, *supra*, Appendix.

19. Sen. Rep. No. 1622, *supra*, page 1.

20. Corresponding generally to Section 102 of the 1939 Code.

21. Chapter 1, Subchapter E, Sections 441 *et seq.*

22. Chapter 1, Subchapter C, Sections 301 to 395.

23. Section 167, 1954 Code.

24. Sections 34 and 116, 1954 Code.

25. Section 174, 1954 Code.

26. Sections 1235, 1954 Code.

27. Section 175, 1954 Code.

28. Sections 611-613, 1954 Code.

There is considerable doubt as to whether the depreciation change and the dividends received exclusion and credit will be as useful incentives as some observers had hoped in view of their limitations. The depreciation change is only a small step in the right direction, eventual solution in this field coming only with the elimination of Bulletin F and adoption of a pre-1934 system of "optional" depreciation for all taxpayers.

Some observers feel the 4 per cent dividend-received credit is not a sufficient inducement to encourage taxpayers with funds in savings accounts to risk loss of their capital in equity investments.

Loopholes Closed

All has not gone well in the new law for some taxpayers who have enjoyed the benefits of 1939 Code provisions designated by the Congress as "loopholes" and "abuses". Senate Finance Committee Chairman Millikin stated that fifty specific provisions of the new law closes such loopholes, and he listed a few, as follows:

Section 751, relating to collapsible partnerships and sale of fees by partners;

Section 1232, relating to bond discount;

Section 171, relating to amortization of premiums on callable bonds;

Section 306, relating to preferred stock bail-out;

Section 269, acquisition made to avoid tax;

Section 382, relating to trafficking in net loss operations;

Section 264, relating to single premium insurance and annuity policies, proceeds of life insurance paid in installments;

Section 101, relating to multiple employee death benefits; and Sections 501 and 514, relating to leasebacks and unrelated business income of tax-exempt organizations and pension trusts.[29]

No Retroactivity Beyond January 1, 1954

Congress has been careful in the 1954 Code to make many of its provisions effective January 1, 1954, but no earlier. The new Code was not designed to grant retroactive relief for years prior to 1954.

On the other hand, taxpayers and their counsel must be extremely careful in reading the new law to note the effective dates of each provision. Because of the many transitional problems, the need to give taxpayers adequate notice, and the aim of Congress to pass no retroactive legislation unfavorable to taxpayers, the new Code has been riddled with special effective dates. These are not easily found, since they are scattered throughout the Code, and no clear warning has been given in the law itself.

The Commissioner of Internal Revenue, faced with one of the greatest tasks in the history of his office, has issued "stopgap" regulations[30] prescribing that any regulation issued under or pursuant to any provision of law in effect on the date of enactment of the 1954 Code is made applicable to the provisions of the 1954 Code, insofar as any such regulation is not inconsistent with the 1954 Code. Elections and other acts under prior laws are to be given the same effect under the corresponding provisions of the 1954 Code to the extent not inconsistent therewith.

The Commissioner has also prescribed and made applicable for use under the 1954 Code all internal revenue forms heretofore prescribed insofar as such forms are not inconsistent with the 1954 Code.[31]

In the meantime, the Commissioner's staff has been busily engaged in drafting new proposed regulations and forms under the 1954 Code, the regulations to be published in the *Federal Register* under the usual notice-of-rule-making procedure to give the public thirty days within which to submit comments and recommendations.[32] Taxpayers and their attorneys need not wait for the proposed regulations, however, to submit suggestions. They will be accepted, in writing, at any time.

The Commissioner has asked the public not to request rulings under the new law pending the issuance of regulations to implement the 1954 Code provisions.[33] Of course, requests for rulings will still be accepted and processed where the questions involved are controlled by those portions of the 1939 Code which have not been changed in the new law.[34]

29. Cong. Rec., June 28, 1954, at 8542.
30. T. D. 6091, Fed. Reg. August 17, 1954 (19 F. R. 5167).
31. IR-Mimeograph No. 54-148, Com. No. 10, August 16, 1954.
32. Internal Revenue Service News Release, IR-078, August 10, 1954.
33. Internal Revenue Service News Release, IR-077, August 10, 1954.
34. *Ibid.*

The object of a lawsuit is to get at the truth and arrive at the right result. That is the sole objective of the judge, and counsel should never lose sight of that objective in thinking that the end purpose is to win for his side. Counsel exclusively bent on winning may find that he and the umpire are not in the same game.

David W. Peck, "The Complement of Court and Counsel", *The Record of the Association of the Bar of the City of New York*, Vol. 9, No. 6, June, 1954, page 272, at 274.

American Courts in Germany: 600,000 Cases Later

by **Worth B. McCauley** • of the Oklahoma Bar (Bristow)

■ **The story of the Courts of the Allied High Commission in Germany is a fascinating account of the difficulties of administering justice in the harsh postwar days of ruin and hunger that followed the collapse of Hitler's Reich. Mr. McCauley wrote this article while he was the Chief Attorney for the Courts of the Allied High Commission. He resigned and returned to the United States in September, 1953.**

■ The Allied Contractual Agreement with the Federal Republic of Germany has been signed and is awaiting formal ratification by the respective legislative bodies. With this ratification, the Federal Republic of Germany will take her place as a democracy with the free nations of the world, have equal standing and will be dedicated to the preservation of her freedom and maintaining a constitutional government. This agreement provides for the dissolution of all the occupation courts of the Allied High Commissions. Then the duly constituted courts of Western Germany will have the jurisdiction of a sovereign power formerly exercised by the three occupying nations.

This article is intended as a résumé of the use of the American judicial process in military occupation jurisprudence and its effect upon the German people, as seen through the eyes of a lawyer who assisted in the program from 1943 to 1953. "600,000 Cases Later" represents the number of criminal cases which have been tried since the beginning of the occupation in 1945 by the Military Government Courts of the Department of the Army and their successor courts, the United States Courts of the Allied High Commission under the State Department. Although the composition of the courts has undergone changes from time to time with greater emphasis being placed upon civilian characteristics, there has been continuity throughout.[1] The most radical change occurred in August, 1948, when General Lucius D. Clay, then United States Military Governor for Germany, created an integrated civilian court system and established a Court of Appeals to replace the former reviewing boards. This transferred the jurisdiction of Military Government Summary, Intermediate and General Trial Courts to District Courts of the eleven judicial districts composing the United States Area of Control.[2]

During my leaves stateside since 1945 I have often been asked the question, "Why have Military Government Courts? Isn't an occupation by its very nature a military rule of the victorious over the vanquished? Why have courts?" The best and most succinct answer to this question is to be found in General Clay's comment appearing in his book, *Decision in Germany*,[3] when he gives his aspirations for the administration of justice in the United States Area of Occupation: ". . . We were trying to make our own judicial procedure an example of democratic justice and concern for the individual."

Two articles have appeared in the AMERICAN BAR ASSOCIATION JOURNAL concerning the United States Military Government Courts: One by Eli Nobleman entitled "Military Government Courts: Law and Order in the American Zone of Germany"[4] and the other written by Justices William Clark and Thomas H. Goodman entitled "American Justice

1. See appendix to Supreme Court opinions in *Madsen v. Kinsella*, 343 U. S. 341 (1952).

2. Mil. Govt. Ordinance No. 31, 14 Fed. Reg. 124, 125, 126.

3. "Restoration of Law and Order" from *Decision in Europe* by General Lucius D. Clay.

"I believed that democratic growth in Germany was possible and I determined to make Military Government a rule of law.

". . . These lawyers believed sincerely in a rule of law, even in an occupation, and in justice under the law. Their liberal and broad viewpoints permeated every phase of our activities and contributed materially to our efforts to develop true liberalism in German thought and spirit. . . .

"On January 7, 1948, in a further effort to restore normal justice the right of habeas corpus was extended to all persons other than security risks who came under the jurisdiction of the Military Govt. Courts, and in a few months was extended to include security arrests. Thus we were trying to make our own judicial procedures an example of democratic justice and concern for the individual."

4. 33 *A.B.A.J.* 777 (1947).

in Occupied Germany."[5] These articles describe the advances which were made in the court system when each succeeding step was an improvement upon the former. No known attempt has been made to date to explain what these 600,000 cases were, what they represented in the occupation or why they were tried or what the results were. The story of these cases shows that our basic concept has been followed; namely, to establish and administer justice by law through the American concept and system of due process.

The military occupation of Germany has been roughly divided into four periods known as the four D's. These are Demilitarization, Denazification, Democratization, and Defense of Western Europe. The criminal cases coming before our courts emphasize these four phases and the case trends illustrate the story of the occupation.

Military Law Was the Only Law at the Fall of Germany

At the beginning of the occupation in 1945, there were no German courts and the only law was the military law of the Supreme Commander, General Eisenhower. Among the first steps taken by him was that of stripping the German law of its Nazi provisions and declaring the remaining basic law to be the recognized law of the land.[6] As a result the statutory criminal law of Germany became the German Criminal Code of 1871 and the special laws enacted by, or with the permission of, the occupying powers.

A common type of case during the phase of demilitarization was that of illegal possession of war material such as guns, ammunition, army clothing and foodstuffs. With the surrender of the German Army the people made open raids on their army installations and took whatever they thought they could use. We had many cases dealing with theft of material, everything from radium, uranium and heavy water to clothing and metals. Enormous caches of supplies were found and the thieves prosecuted. Other types of offenses committed during this period were curfew violations, prohibited border crossings, use of false identification and the violation of the numerous regulations which were imposed upon the movements of persons and property. As hoarded goods and food supplies vanished, the bitter cold winter of 1946-47 brought about the greatest number of thefts of food and coal from U. S. Army installations. I shall never forget those black days in Munich in the cold, heatless winter of 1946 and 1947. We would have to call court recesses to give the stenographers, reporters and defense counsel soup, chocolate or coffee so that they could continue their work. It was then that we saw starvation at work and learned that people die from malnutrition and lowered resistance oftener than they actually starve to death.

It was during this time that we had enormous populations of displaced persons and former slave labor. These had been liberated and many of them had organized themselves into marauding bands and were committing acts of arson, murder, rape and pillage. These people had been subjected to brutal force, and that was the only language they knew. All jurisdiction over DP's was kept in military government courts because it was felt that they needed special handling and that there was a strong prejudice against them in the German mind. Not until 1950 were they placed under German court jurisdiction.

The "Bicycle Case" is illustrative of the serious type of prosecution we had at that time. In the spring of 1946, four DP's in Bavaria started out one morning to go from one DP camp to another. They were armed with stolen weapons. The youngest was 20, the oldest 24. They decided that they should each have a bicycle. They proceeded to a bicycle path near a wooded area south of Munich and there accosted the first person who came along riding a bicycle. The victim was stopped and his wheel taken from him. Then one of the boys marched him into the woods, shot him in the head and took all of his clothes and belongings. This same procedure was repeated on two more victims within a distance of about 800 yards. Three of these boys had committed murder to obtain a bicycle and the small personal belongings of the victim. At the trial the fourth member of the group was asked why he had not killed a bicyclist and obtained a wheel. His only excuse was "that another cyclist did not come along after it became his turn". The psychology behind this case was not so much vengeance against the Germans who were their former oppressors as it was brutality and total lack of regard for human life. These four young men had been moved from their homelands in their early teens. One was a Russian, two were Polish and the other a Yugoslav. They had been living and working in forced labor camps run by the Germans, and they had become inured to a system where human life meant nothing.

Before the demilitarization phase had ended, denazification was started. It should be understood that denazification was primarily the responsibility of the German State governments and their special denazification courts. It was not a function of our Military Government courts nor of the regular German courts. Every German adult had been required to fill out a questionnaire by the Military Government setting forth his Nazi Party affiliations and position. Thousands of former Nazis, thinking that the authorities would never be able to detect discrepancies in their sworn statements, proceeded to submit false returns. On the basis of this information people were placed in one of five categories: major offenders, offenders, lesser offenders, followers and exonerated. Thousands of the returns submitted were found to be false. We were able to establish this fact due to the discovery of a warehouse of Nazi Party

5. 36 A.B.A.J. 443 (1950).

6. Proclamation No. 2 of U.S.F.E.T. dated September 19, 1945: "The German law in force at the time of occupation shall be applicable in each area of the United States Zone."

records in Munich in 1946. The good old German custom of making a record of everything and then putting form stamps on it was the undoing of the former Party members who falsified their questionnaires. Thus our courts were flooded with the prosecution of these cases of false affidavits made to U.S.M.G. Our principle of prosecuting them was the same which we follow in the United States in prosecuting those who make out false income tax returns, and our evaluation as to whether to prosecute or not was largely the same. We did not prosecute unless there was a deliberate attempt to mislead and by so doing to realize an advantage. In spite of the number of these cases, I do not want to leave the impression that the German people are fundamentally dishonest. We have all been impressed by the truthfulness of those testifying in our courts.

As the first step, demilitarization shades into the era of denazification, so the latter overlaps into the process democratization. General Clay, the Military Governor, announced late in 1947 that the period of destruction was ending, and that we were entering upon one of construction.

Democracy has little appeal to a starving people who cannot get the essentials of life. Most of them were existing on a marginal food ration which as they said, was a little too much to die on but not enough to live on. Their homes had been unheated even through the coldest winter in eighty years. Business was practically at a standstill because of war destruction and a valueless currency. Even the smallest purchase was difficult to make except on a barter basis, for the smallest representation of real goods had much greater value than many worthless Reichsmarks. Our case load in the American Zone reached its peak during the winter of 1946 and year of 1947. An average of 20,000 criminal cases was being prosecuted each month and yet the situation was not being improved. The struggle for survival was making potential criminals of nearly the whole nation.

Currency Reform Is a Great Step Forward

From the viewpoint of law enforcement, the greatest one thing that has happened during the entire occupation was the currency reform in June, 1948. At that time the highly inflated Reichsmark was replaced and devalued by the Deutschemark, commonly referred to as the D-mark. Goods appeared overnight and were sold for D-marks instead of being bartered surreptitiously as before. The people began to forget their pangs of hunger and to give thought to the future democratic Germany. This reform was made possible by the efforts of England, France and the United States and would have come sooner except for Russian recalcitrance.

The Germans who had had to blackmarket for survival could now devote their efforts to making an honest living. We who were charged with enforcing law and order saw an immediate drop in the case load of thefts, pilferage and such. We could now support the German economy effectively by the enforcement of tax laws, customs regulations, foreign currency controls and the economic measures imposed to develop the country's industry.

With the betterment of the German economy and the lessening of our criminal case load together with the adoption of our integrated court system in 1948, we were enabled to give more attention to the democratization program through our administration of justice. To understand what our American procedure means in Germany one must not only know our procedure, but must also understand the German and Continental system.

The difference between the German and American procedure is explained in the opinion by Justice Robinson in the case of *United States Military Government* v. *Heinrich Daum, Erich Roehm, and Heinrich Roehm*, 7 Court of Appeals Reports 118:

> It is regrettable that counsel for the appellants has misconstrued the operation and function of a Military Government Court, so as to assume that the Judges in these Courts function in the same manner as judges in German courts. The practice is quite the contrary. Actually the disparity between the two practices is great. We speak of trials at common law as adversary proceedings in which each party is charged by law and custom with specific responsibilities and specific rights. The parties frame the issues for trial and produce the factual material for decision. The Judge, in such proceedings, though occupying a position of the greatest importance, is not nearly as active a participant as the German Judge. Whereas in trials before a German court the role of defense counsel is perhaps that of the least active person in the courtroom, in a common law trial he plays a very significant part.

One must visit a German courtroom to understand how different their procedure is from ours. The state's attorney sits at the bench with the three judges while the defense attorney has little participation except to take notes of the proceedings for possible appeal. All questioning is done by the judges who have before them the police dossier of investigation and interrogation. This in itself is a pre-determination of guilt by a police magistrate. There is no right against self-incrimination and hearsay evidence is admissible. It is much easier to convict in a German court than an American because of the differences in procedure and theory which boil down to a pre-supposition of guilt rather than innocence.

Two of our most far-reaching enactments were made to protect the civil liberties of the individual. The first of these was Military Government Ordinance 23 providing for habeas corpus proceedings before our courts, and the second was rigid regulations against unlawful arrest, search and seizure.[7] These measures, constituting drastic restrictions upon our police powers, were not only a revelation to the German people, but also constituted one of the greatest advancements in our own concepts of military jurisprudence in occupied areas.

7. European Command SOP 96.

These measures provide that a person can be arrested or his person or property searched and seized only upon warrant duly issued. The arrested person must be brought before our courts within twenty-four hours for preliminary hearing, to be advised of the charges against him and to have counsel of his choice. If the accused is unable to procure counsel, then it is the duty of the court to appoint counsel for him. He is entitled to be released upon reasonable bail except where the offense charged is murder, rape or robbery with firearms. At the outset I was afraid that these measures to protect the liberties of the individual might be mistaken as a sign of weakness. However, when the German States of Bavaria, Hesse and Württemberg-Baden adopted their state constitutions and when later the constitution of the Federal Government was adopted, it was interesting to note that these measures and guarantees were enacted into these constitutions.

There have been lawyers from every country in Europe practicing before our courts ever since their inception. The majority of them have been German and the others have been here primarily as the result of the great displacement of peoples during the war and the events that have followed it. Our procedure was as foreign to them as theirs would have been to us. It has always been the custom of the American lawyers, both judges and prosecutors, to assist these European lawyers in the execution of their duties in our courts. In 1948 we were able to institute legal seminars to help them and for any others who might wish to attend.

The Association of Foreign Lawyers was organized in 1948 by those lawyers who had fled to Western Germany and were admitted to practice before our courts. They represented every country behind the Iron Curtain. Their representation in the United States Military Government Courts of their fellow displaced citizens did much to instill confidence in the system and to break down the barriers which language and custom had naturally imposed. Here I might pause to say that one of the operational difficulties we have met has been that of language. The entire proceedings of each case have been carried on in both English and German as well as the native language of the accused if it was neither of these. It has been a privilege for us American lawyers to work with these fine representatives of our profession and we have learned a great deal of comparative law through them. The experience has given us a new appreciation of the liberties we Americans take so for granted.

To a lawyer and student of military jurisprudence, the most interesting and controversial legal questions that grew out of the occupation arose over the jurisdiction of our Commission Courts to try American civilians who are accompanying the Army, and whether or not such persons are amenable to the German law.

These two questions were answered in the cases of the *U. S. Military Government* v. *Wilma Ybarbo*[8] and *U. S. High Commissioner* v. *Yvette Madsen*.[9] Both cases involved the killing of military husbands by dependent American wives who had accompanied their husbands to the U. S. Zone of Germany. In each case the women were charged, tried and found guilty by our courts of violating the German law of homicide. Mrs. Ybarbo's sentence was commuted by General Clay, so the jurisdictional question and application of German law was not tested by the federal courts in the United States. However, Mrs. Madsen was subsequently returned to the United States to serve her fifteen years sentence in the Federal Reformatory for Women at Alderson, West Virginia.

After her commitment in the United States, she sought to obtain her release by seeking a writ of habeas corpus in the United States District Court of West Virginia, directed against Nina Kinsella, Warden of the Reformatory, *Madsen* v. *Kinsella*, 93 F. Supp. 319 (D.C. W. Va., 1950). Therein she attacked her conviction by the U. S. Courts of the Allied High Commission, maintaining that the court which tried her was without jurisdiction to try her, that as an American citizen she was not subject to the German law, and, third, that she was one of a class of persons subject to the exclusive jurisdiction of courts martial under the second Article of War. The United States District Court held that the U. S. Courts of the Allied High Commission are recognized by law as coming within the presidential constitutional power as Commander in Chief of the Army and Navy and the power to wage war, and that the courts exercised concurrent jurisdiction with that of courts martial.[10]

In answer to the petitioner's contention that she was not amenable to the application of German law under General Eisenhower's Proclamation No. 2 and subsequent legislation the Court stated:[11]

> It is clear that the purpose of Proclamation No. 2 was to give German law a territorial, not an ethnological, application.
>
> There is no restriction of the jurisdiction to German citizens, and no exemption therefrom of American citizens.
>
> It is, therefore, clear that the petitioner's American citizenship did not immunize her from trial for a violation of the German statute against murder.
>
> The Law of War imposes upon an occupying army the obligation to furnish the inhabitants of the country with a system of laws and courts;

8. *United States* v. *Ybarbo*, Court of Appeals Reports 208, decided March 14, 1949.

9. *Office of the United States High Commissioner for Germany* v. *Madsen*, 8 C.A.R. 495 (1950).

10. "The power of the United States thus to govern a conquered and occupied country does not stem from any explicit provision of the Federal Constitution. It is, however, implicit in the words of that instrument which make the President the Commander-in-Chief of the Army and Navy. Congress is vested by the Constitution with the power to declare war, and to raise and support armies; but the President, as Commander-in-Chief, is given the power to wage the war which Congress had declared." *Ex parte Quirin*, 317 U. S. 1; Winthrop, *Military Law and Precedents* (2d ed., 1920 reprint) page 831.

11. Military Government Ordinance No. 2 gave the courts jurisdiction over "all offenses under the laws of the occupied territory or any part thereof" and Military Government Ordinance No. 31 giving the courts jurisdiction of "offenses under German law in force in the Judicial District of the Court".

since the power must be coextensive with the obligation, the jurisdiction of the military courts or commissions which are set up by the occupying army extends to whatever matters may be committed to such tribunals by the Commander-in-Chief of the occupation force.

An appeal was taken from the ruling of the United States District Court to the United States Court of Appeals for the Fourth Circuit[12]. There, in the opinion by Chief Judge Parker, the decision of the District Court refusing the order to discharge the petitioner and remanding her to custody was affirmed.

Here again the court clarified the nature, authority and jurisdiction of the U. S. Courts of the Allied High Commission.[13] From the decision of the United States Court of Appeals, Mrs. Madsen took an appeal to the United States Supreme Court. In an opinion by Mr. Justice Burton the Supreme Court on April 28, 1952,[14] affirmed the District Court and the Court of Appeals and held that the United States Court of the Allied High Commission for Germany had jurisdiction, in 1950, to try such a case in violation of Paragraph 211 of the German Criminal Code.

In answering the contention of the petitioner that she was subject exclusively to courts-martial jurisdiction, the Court traced the history of the Articles of War providing for courts-martial jurisdiction and the jurisdiction of the military commissions or tribunals, commonly referred to as the "common-law war courts", and held that Article of War 15[16] preserved to such common-law war courts jurisdiction of offenses and persons such as the petitioner.

It is most gratifying to us who had sought to make our court system reflect our American principles of equal justice that the Supreme Court recognized these efforts by commenting: "This (Ordinance No. 2) subjected German and United States civilians to the same procedure and exhibited confidence in the fairness of these procedures."[17]

Our time schedule for the democratization program in the courts and administration of justice was upset by the shifting phases of the occupation from the program of democratization to that of mutual defense, as were the other programs of our occupation.

At the very time we were making plans for the new integrated court system in 1948, Russia established the blockade on Berlin. We found ourselves with the double program of continuing with democratization and providing for the defense of Germany and the other areas where we had incurred a responsibility of

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protection recognized by Article 43 of the Hague Convention. Thus we entered our fourth phase of providing for our mutual defense while we were still trying to establish a new democratic Germany.

The Final Phase: Defense Against Russia

The last phase of the military occupation of Germany has been and is one of common defense against the East. It is well to remember that the Russian blockade was established

(*Continued on page 1101*)

12. *Madsen v. Kinsella*, 188 F. 2d 272.

13. "It is the duty of the occupying power to provide, as far as possible, for the security of persons and property and the administration of justice within the territory; and this is a military duty which devolves upon the President, as Commander-in-Chief, who is entrusted as such with the direction of the military force by which the occupation is held [citing *Santiago v. Nogueras*, 214 U. S. 260, 266, 29 S. Ct. 608, 53 L. ed. 989; *The Grapeshot*, 9 Wall. 129, 19 L. ed. 651; *Leitensdorfer v. Webb*, 20 How. 176, 15 L. ed. 891; *Cross v. Harrison*, 16 How. 164, 189, 14 L. ed. 889.]

"We think it entirely immaterial that the President at the time of the trial of appellant was carrying on Military Government in the occupied zone of Germany through the State Department instead of through the Army and was using civilian instead of Army personnel as judges of the courts. It was for the President, as Commander-in-Chief, to use such governmental department or agency as he thought proper in governing the conquered territory; and Congress in making appropriations to the Army for the expenses of the occupation expressly authorized the President to transfer to other departments the functions provided for under the appropriations (Act of Oct. 6, 1949, P.L. 327, 81st Cong. 63 Stat. 709, C. 621).

"And we think it equally clear that the occupation courts had authority to try the appellant for murder under the law of Germany. It is the general law that local criminal law in an occupied area continues to bind civilians unless changed by the occupying power."

14. *Madsen v. Kinsella*, No. 411, Oct. Term 1951.

15. "211. First Degree of Murder (Mord)

(1) The murderer shall be punished with death. (2) A murderer is he who (a) from bloodlust, (b) for the satisfaction of the sexual impulse, (c) from covetousness or else from (other equally) base motives; (d) treacherously or (e) cruelly or (f) by means causing common danger, or in order (g) to render possible or (h) to conceal another crime, kills another human being. (3) Should the death penalty in especially exceptional cases not be fitting, the penalty is *Zuchthaus* for life." (Translation by Oidtman).

16. Article of War 15:

"Jurisdiction not Exclusive.—The provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war be triable by such military commissions, provost courts, or other military tribunals."

17. United States Military Government Ordinance No. 2, in 1946, provided: "(e) Article V; Rights of Accused. (1) every person accused before a Military Government Court shall be entitled:

(i) To have in advance of trial a copy of the charges upon which he is to be tried;

(ii) To be present at his trial, to give evidence and to examine or cross-examine any witness; but the court may proceed in the absence of the accused if the accused has applied for and been granted permission to be absent, or if the accused is believed to be a fugitive from justice;

(iii) To consult a lawyer before trial and to conduct his own defense or to be represented at the trial by a lawyer of his own choice, subject to the right of the court to debar any person from appearing before the court;

(iv) In any case in which a sentence of death may be imposed, to be represented by an officer of the Allied Forces, if he is not otherwise represented;

(v) To bring with him to his trial such material witnesses in his defense as he may wish, or to have them summoned by the court at his request, if practicable;

(vi) To apply to the court for an adjournment where necessary to enable him to prepare his defense;

(vii) To have the proceedings translated, when he is otherwise unable to understand the language in which they are conducted. . . ." 12 Fed. Reg. 2191.

The Rosenberg Case:

History and Hysteria

by Norman S. Beier and Leonard B. Sand • of the New York Bar (New York City)

■ Few criminal trials in recent history have aroused such prolonged public interest as the espionage case of Ethel and Julius Rosenberg. The nature of the crime, the exhaustive review that the convictions received and the dramatic special term of the Supreme Court called to consider a last-minute stay of execution were all interesting for their own sakes. The Communists, however, saw a chance to make use of the case by propagandizing the Rosenbergs as martyrs. The success of the Communist effort is greater than most Americans suppose, according to Mr. Beier and Mr. Sand.

■ On June 19, 1953, Julius and Ethel Rosenberg were executed. While they were on trial for the crime of having conspired to commit espionage on behalf of the Soviet Union, their case received almost no coverage in the Communist press. Soon after their conviction, however, when it became apparent that the Rosenbergs had chosen martyrdom, organized efforts were initiated to create the impression that the two spies were innocent scapegoats of a fear-ridden and prejudiced society.

This campaign, which did not hesitate in its use of bald lies and gross distortions, has unfortunately met with some success. In Europe especially, where the true facts of the case were belatedly and inadequately disseminated, the Communist effort to equate the Rosenberg case with those of Dreyfus and Sacco and Vanzetti gained considerable popular acceptance. The initial battle for the truth was lost by default. Here, the American press was of course more effective in presenting an accurate picture of the proceedings, yet one nevertheless finds that misconceptions concerning the case flourish. Surely the more vicious and blatant of these untruths about the Rosenberg case, some of which were initiated by those aware of their falsity and many of which were accepted and spread by the gullible and uninformed, should not go unanswered.

Legal issues are of interest to but a limited audience, but personalities have universal appeal. For this reason the Communist propagandists fully exploited the fact that the Rosenbergs were parents of two small children and, for this reason, the trial judge became a particular target in the crusade to make the Rosenbergs appear victims of judicial oppression and mass hysteria.

The trial judge, Irving R. Kaufman, was subjected to constant vilification and even to threats of physical harm to himself and his family. And the lies were spread.

It is easy to understand, however, why these critics of Judge Kaufman were forced to employ such tactics. The fairness of the trial over which he presided was re-examined and upheld on numerous occasions, for in addition to sixteen applications in the district court, there were seven appeals to the Court of Appeals, seven applications to the Supreme Court, and two applications to the President for executive clemency. Although ordinarily a reviewing court will reverse the trial court only if the error committed below is deemed to be "substantial" and will dismiss minor or technical mistakes as "harmless error", because of the peculiar nature of this case, the Court of Appeals indicated that it would have reversed had *any* error been found. Of course, the conviction was affirmed.

Examples of the judge's fairness and the pains he took to avoid prejudice during the trial are many. To eliminate prospective jurors who might be biased or intolerant, Judge Kaufman questioned them to an even greater extent than requested by defense counsel. Where there was the slightest doubt of a prospective juror's complete objectivity or where a juror was at all reluctant to serve, Judge Kaufman himself excused the juror. Moreover, although entitled to only twenty jury challenges, he permitted the defendants to exercise

thirty challenges. In fact, the defendants saw fit to use only twenty-nine challenges before they announced that the jury was acceptable to them.

At the trial itself evidence was introduced which showed that the Rosenbergs were active members of the Communist Party, and some have said that the judge permitted this solely to prejudice the jury and confuse the issues. But had the Government been prevented from introducing evidence of the Rosenbergs' Party activities, there would have been no showing of a motive for the espionage. Of course, no jury would feel that it had heard the complete story if the motive for the crime was kept from it. Although the United States Court of Appeals for the Second Circuit in affirming the conviction held that independent proof of party membership would have been proper, in fact no evidence was introduced solely for the purpose of demonstrating that the Rosenbergs were Communists. Politics and espionage were so inextricably intertwined in the conversations of the Rosenbergs that in recounting them to the jury the witnesses could not very well have separated the two without distorting the meaning of what was said.

Besides the question of motivation the Rosenbergs' Communist affiliations established their *modus operandi*. Julius Rosenberg told David and Ruth Greenglass and Max Elitcher, three Government witnesses, that it was through the Communist Party organization that he established initial contact with the Soviet officials.

Repeatedly during the course of the trial and again in his final charge to the jury, the Judge emphasized that Communist Party membership was relevant solely to show an intent to aid the Soviet Union, a necessary element of the crime, and was not otherwise to be considered in passing judgment upon the defendants.

Later embarrassing to those who sought by every means to discredit and besmirch Judge Kaufman were the words of their defense counsel, the late Emanuel Bloch, uttered in open court. In his summation to the jury, and before the Rosenberg case became a propaganda crusade where truth was abandoned, Bloch said:

> I would like to say to the Court on behalf of all defense counsel that we feel that you have treated us with utmost courtesy, that you have extended to us the privileges that we expect as lawyers, and despite any disagreements we may have had with the Court on questions of law, we feel that the trial has been conducted and we hope that we have contributed our share with that dignity and that decorum that befits an American trial.

And immediately after the jury announced its verdict he repeated:

> I would like to restate what I said when I opened to the jury. I want to extend my appreciation to the Court for its courtesies, and again I repeat I want to extend my appreciation for the courtesies extended to me by Mr. Saypol and the members of his staff, as well as the members of the FBI, and I would like to say to the jury that a lawyer does not always win a case; all that a lawyer expects is a jury to decide a case on the evidence with mature deliberation.
>
> I feel satisfied by reason of the length of time that you took for your deliberation, as well as the questions asked during the course of your deliberations that you examined very carefully the evidence and came to a certain conclusion.

Surely, he, so close to the trial itself, and the interests of the defendants, was *then* in a better position to evaluate the fairness of the trial than were the pamphleteers who followed.

Apart from the conduct of the judge, efforts have been made to create the impression that the Rosenberg case was a "weak one", and that there was therefore doubt as to the correctness of the jury's unanimous finding of guilt. Accomplice testimony is traditionally regarded as suspect, and the theory that the Rosenberg case was a weak one is predicated on the assertion that it was limited to such accomplice testimony. But the fact is that the evidence presented at the trial established overwhelmingly the guilt of the Rosenbergs, and this testimony was *not* forthcoming solely from the lips of accomplices. For example there was the testimony of Max Elitcher.

Max Elitcher, an electrical engineer, attended City College in the late 30's with Julius Rosenberg and Morton Sobell. (Sobell, a co-defendant of the Rosenbergs, was sentenced to thirty years for his espionage activities and is now serving his sentence in Alcatraz.) After graduation in 1939, Elitcher roomed with Sobell in Washington, D. C., where both worked at the Bureau of Ordnance of the Navy Department. Sobell induced Elitcher to join a Communist Party group in Washington. In June, 1944, at which time Elitcher was married and Sobell was no longer in Washington, Rosenberg visited Elitcher and told him that the war effort of the Soviet Union was being impeded by some interests in the United States, and to counteract this, many people were furnishing the Soviet Union with military information. Rosenberg asked Elitcher if he had access to such information and told him that if he did contribute military data they would be microphotographed and precautions would be taken to keep the microfilm from falling into the wrong hands and to secure the expeditious return of the original documents. To encourage Elitcher, Rosenberg confided that Sobell was among those giving away this country's secrets. This was confirmed subsequently by Sobell when he and Elitcher vacationed together.

Elitcher kept putting Rosenberg off, neither contributing information nor refusing to do so. On a visit to Rosenberg in New York in the spring of 1945, Rosenberg told Elitcher that he was relieved to find out that his, Rosenberg's, dismissal from the Army Signal Corps for "security reasons" was because of his activity in the Communist Party and not because his espionage activities were known.

Rosenberg again asked Elitcher in September, 1945, to contribute information, and in the early part of

1946 Rosenberg and Sobell tried to induce Elitcher to turn over a classified ordnance pamphlet concerning a gun fire-control system on which Elitcher was working. Rosenberg at this time also told Elitcher that there was a "leak" in the espionage setup and to discontinue his Communist Party activities and not visit him.

In June of 1948 Rosenberg and Sobell met with Elitcher in New York and attempted to dissuade Elitcher from his intended plan to leave the Bureau of Ordnance and work for a private firm in New York. Rosenberg stated that he needed a source of information in the Navy Department and had already made plans for Elitcher to meet a contact in Washington. Rosenberg stayed and had dinner with Elitcher, and Rosenberg related how he had started in the espionage venture.

Elitcher did not follow the group's advice, but changed to the New York job. As he drove to New York he thought he was being followed. He stopped at Sobell's house in New York and told Sobell this. Sobell became upset because he had some microfilmed information "too valuable to be destroyed", and Sobell had Elitcher drive him to Julius Rosenberg's house to deliver the film that night.

The jurors unquestionably believed Max Elitcher's testimony because they were told that if they did not believe Max Elitcher they must acquit Sobell—and Sobell was convicted. Elitcher's testimony alone would have been sufficient to convict Julius Rosenberg. Elitcher was not an accomplice. No motive for Elitcher to falsify is alleged by the pamphleteers, but rather his testimony is impliedly conceded to be accurate in their calling him a "worm" and an "informer".

Other Testimony That Establishes Rosenberg Guilt

There was, of course, considerable other non-accomplice testimony in addition to that of Elitcher who gave a complete picture of the operation of the espionage ring over a long period of time. There was the testimony of the photographer Schneider who told of the visit by the Rosenbergs and their children to his shop to obtain passport pictures. There was also the testimony of Doctor George Bernhardt, asked by Julius Rosenberg as to the innoculations needed for a trip to Mexico, the escape route. This testimony of completely disinterested witnesses showed the Rosenbergs' plans to flee the country. That flight serves as evidence of an awareness of guilt is a concept which commends itself not only as a valid legal principle, but as common sense as well.

Sobell, indeed, did suddenly take flight and was apprehended in Mexico. Sobell did not testify at the trial, but instead tried to create the impression through his counsel that his dash to Mexico was a short vacation trip. Yet while there he used five aliases in mysterious trips to Mexico's seaport towns; he corresponded with relatives in the United States through an intermediary friend, using fictitious return addresses on his letters; and he told a neighbor in Mexico City that the military police were looking for him to take him back into the United States Army and that he was afraid to return to the Army because he had already experienced one war. In fact, however, he had never been in the Army but had been in a deferred classification during World War II.

Returning to Max Elitcher, his testimony also shows the fallacy of another popular misconception which is that the Rosenbergs were only charged with transmitting information regarding *the atom bomb* to the Soviet Union. Around this concept centered much of the last minute Supreme Court proceedings which turned on the relevance of the Atomic Energy Act of 1946 to the facts of this case. However, neither the charges in the indictment nor the proof at the trial was limited to atomic espionage.

It is true, though, that of all the testimony, the most damaging was that of the accomplice David Greenglass with respect to the transmission of atomic data and a major effort has therefore been made to discredit his testimony.

David Greenglass, brother of Ethel Rosenberg, while an army sergeant,

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was stationed at the secrecy-shrouded atomic project at Los Alamos, New Mexico. Julius Rosenberg, who learned of the nature of this project even before it was known to Greenglass, prevailed upon Greenglass, through his wife Ruth, to pass on such information as might come his way. To Julius Rosenberg, Greenglass gave a detailed description of the project itself including personnel and security measures; and to the Soviet courier, Harry Gold, Greenglass gave the key to the atom bomb—a sketch of the lens mold which was the secret of detonation, and a cross-section diagram of the bomb itself.

An alleged motive for Greenglass to fabricate a story against his sister and brother-in-law, Ethel and Julius Rosenberg, is his desire to spare his wife Ruth from Government prosecution. But it is only from the lips of David Greenglass himself that Ruth Greenglass' implication was revealed. If his story were a fabrication the most logical fabrication would be to avoid *any* implication of his wife at all. Further, if he had merely been seeking a scapegoat on whom to shift the blame, and if, as alleged, he was giving vent to a deep-rooted hatred of Julius, there was no need to implicate, in addition to Julius Rosenberg, his sister Ethel as well as his wife.

In a further effort to discredit Greenglass it is said that he was but a mechanic with a limited education and scientific background and was therefore incapable of reproducing the complex drawing of the lens mold which was introduced at the trial. This contention is difficult to reconcile with the view also advanced, in an attempt to minimize the damage done by the espionage ring, that the drawings were so crude and inaccurate as to be of no value to the Russians. If the drawings were, in fact, crude and inaccurate then even one of Greenglass' alleged abilities could reproduce them and of course even a crude drawing would be of great value in disclosing the basic method of enclosing controlled atom power in a bomb. But actually, as the Government scientists testified at the trial, the drawings were highly accurate. Far from being incompetent to reproduce them, Greenglass was a highly skilled draftsman who had been selected to render in sheet metal form the shapes designed by the scientists for the component parts of the atom bomb.

The Rosenbergs, at the trial, did not question the secrecy and importance of these sketches nor did they question David Greenglass' participation in their transmission to the Soviet Union. Rather they were at all times willing to stipulate that the reports and sketches transmitted by Greenglass were secret and confidential matter pertaining to the national defense. Their defense was a blanket and uncorroborated denial of all charges, designed to exonerate themselves and by innuendo place the entire responsibility on David Greenglass.

Labelling the crime of the Rosenbergs "worse than murder", Judge Kaufman saw fit to impose the sentence of death. Many, including those opposed to capital punishment in any case and those who felt this action gave to the Rosenbergs martyrdom useful for Communist propaganda purposes, questioned the wisdom of this action. However, many who have been highly critical have founded their objections upon misinformation.

A common misconception is that Judge Kaufman had the alternative of sentencing the Rosenbergs to life imprisonment. It was not until September 3, 1954, that Congress modified the espionage laws to enable imposition of a life sentence or imprisonment for any term of years (P.L. 777, 83d Cong., 2d Sess., §201). But under the statute as it existed at the time of the trial the penalty provided was death or a maximum imprisonment of thirty years. As Judge Kaufman noted when imposing sentence, one sentenced to thirty years' imprisonment can be paroled after serving only ten of those years. Absent parole, sentence would in the normal course of events be reduced one third for good behavior.

No Public Clamor Over Other Executions

Execution of spies and traitors is a practice which has been accepted by all societies and has taken place in our own country during many periods of crisis, such as the Revolutionary and Civil Wars. When, during World War II for example, German saboteurs landed on our shores, they were promptly tried and executed, and few voices were raised in protest at this action. Many today do not even recall this episode. Yet a better case for sympathy and leniency can be made in that instance than with respect to the Rosenbergs. Those who landed in the German submarine were presumably part of a military organization of their native country and were acting under compulsion. But the Rosenbergs, native-born Americans, acted entirely of their own volition, not to further their own country's interest but rather to betray it.

It is noteworthy also that those groups, so vocal in their objection to the death sentence allegedly on the grounds of an abhorrence of capital punishment, were strangely silent with respect to other instances of multiple executions such as in the Greenlease kidnap-murder case and the Heart Throb case.

But one often hears it said that this is the first instance in our nation's history of execution for espionage in peacetime—and this is often construed to mean that not only the execution but the commission of the espionage as well took place only during time of peace. This is untrue, and in fact the statutory power to execute now exists only when espionage is conducted in time of war.

But it is true that the espionage of the Rosenbergs continued after World War II. It was after the war ended that Rosenberg developed a virtual school for spies by inducing "progressive" engineering students to advance their education at Russian expense in order to become more useful members of the espio-

nage ring. He made such offers to Max Elitcher and David Greenglass in 1948 and 1949. He also boasted to Greenglass in 1949 of his many sources of information at various companies doing secret military work, and obtaining from these sources data concerning such new developments as the sky platform project and the application of atomic energy to airplanes. This information was microfilmed and delivered to the Russians. Further, Morton Sobell delivered valuable microfilmed information to Rosenberg in July of 1948. When the curfew sounded on the espionage activities of this group in 1950 through disclosures by Dr. Klaus Fuchs, Harry Gold and David Greenglass, it was the Russians who provided the funds for Sobell, Greenglass and the Rosenbergs to flee—and the escape route was to be from the United States to Mexico, thence to Sweden and Czechoslovakia, and the ultimate destination—the Soviet Union.

These facts should also dispel any misconception that the Rosenbergs acted only during a time when the Soviet Union was our ally, for their espionage continued well into the "cold-war" period when no doubt existed as to the nature of our relations with that power.

Nor can the Rosenbergs' actions be justified as being the product of a conviction that society would benefit by the sharing of the results of atomic research. For as has already been indicated the espionage conspiracy was to accumulate any and all secrets of military value, and extended to such devices as gun fire-control mechanisms and proximity fuses in addition to the other non-atomic activities.

Over a year has now passed since Julius and Ethel Rosenberg went to their deaths in the Sing Sing electric chair believing that history would make of them heroic martyrs. It is still open to question whether the propaganda campaign of the National Committee To Secure Justice for the Rosenbergs was designed to achieve the end set forth in its title or was rather designed to fan the flame of their fanaticism and insure their continued silence. It is clear, however, that justice was done in the Rosenberg case as the legal records and opinions have many times reiterated. But to the public at large niceties of the law and details in procedure are of little significance and there remains only a general impression which has been too largely influenced by the campaign of distortion. It is to the interest of all of us that the facts be known.

Notice by the Board of Elections

■ The following jurisdictions will elect a State Delegate for a three-year term beginning at the adjournment of the 1955 Annual Meeting and ending at the adjournment of the 1958 Annual Meeting:

Arkansas	Nevada
Colorado	New Hampshire
Delaware	New York
Georgia	Ohio
Idaho	Oregon
Indiana	Rhode Island
Louisiana	Utah
Maryland	West Virginia
Minnesota	

Elections will be held in the States of Kansas and Virginia to fill the vacancies for the term expiring at the adjournment of the 1956 Annual Meeting.

Nominating petitions for all State Delegates to be elected in 1955 must be filed with the Board of Elections not later than March 25, 1955. Petitions received too late for publication in the March issue of the JOURNAL (deadline for receipt, January 28) cannot be published prior to distribution of ballots, which will take place on or about April 1, 1955.

Forms of nominating petitions may be obtained from Headquarters of the American Bar Association, 1155 East Sixtieth Street, Chicago 37, Illinois. Nominating petitions must be received at the Headquarters of the Association before the close of business at 5:00 P.M. March 25, 1955.

Attention is called to Section 5, Article VI of the Constitution, which provides:

> Not less than one hundred fifty days before the opening of the annual meeting in each year, twenty-five or more members of the Association in good standing and accredited to a State from which a State Delegate is to be elected in that year, may file with the Board of Elections, constituted as hereinafter provided, a signed petition (which may be in parts), nominating a candidate for the office of State Delegate for and from such state.

Only signatures of members in good standing will be counted. A member who is in default in the payment of dues for six months is not a member in good standing. Each nominating petition must be accompanied by a typewritten list of the names and addresses of the signers in the order in which they appear on the petition.

Special notice is hereby given that no more than twenty-five names of signers to any petition will be published.

Ballots will be mailed to the members in good standing accredited to the states in which elections are to be held within thirty days after the time for filing nominating petitions expires.

BOARD OF ELECTIONS
Edward T. Fairchild, *Chairman*
William P. MacCracken, Jr.
Harold L. Reeve

The Reed-Dirksen Amendment:

Further Developments

by Robert B. Dresser • of the Rhode Island Bar (Providence)

■ Mr. Dresser's latest contribution to the pages of the *Journal* is designed to bring members of the Association up to date on the progress of the so-called Reed-Dirksen Amendment, S. J. Res. 23 and H. J. Res. 103, which would limit the power of Congress to tax incomes, inheritances and gifts. The Reed-Dirksen proposal was endorsed by the House of Delegates of the Association in 1952.

■ On April 27, 1954, the Sub-Committee on Constitutional Amendments of the Senate Judiciary Committee held a hearing on S. J. Res. 23, the Reed-Dirksen Amendment, which limits the power of Congress to tax incomes, inheritances and gifts.

Twenty-four witnesses either testified orally or filed written statements at the hearing or within the permitted period of ten days thereafter. Eighteen of the witnesses favored the Amendment, including Senator Dirksen, Congressman Chauncey W. Reed, Congressman Ralph W. Gwinn, Alvin M. Owsley, Roger J. Mouré and representatives of the American Bar Association, the American Legion, the National Association of Manufacturers, the Western Tax Council, the Committee for Constitutional Government, the Life Insurance Policy Holders Protective Association, the National Economic Council, the National Small Business Men's Association, the Associated Industries of Rhode Island, the Ohio State Bar Association, the Ohio State Chamber of Commerce, the Missouri State Chamber of Commerce and the Steuben Society of America.

The witnesses appearing for the American Bar Association were William Logan Martin, Chairman of the Special Committee of the Association appointed to promote the adoption of the amendment, and Robert T. McCracken, of Philadelphia, and myself, both members of the same committee.

The printing of the transcript of the testimony was long delayed. At the time of writing this article no decision has been rendered by the Judiciary Committee.

The amendment in question is the one introduced in Congress by Senator Dirksen and Congressman Chauncey W. Reed in January, 1953, in substitution for an amendment introduced by them in the fall of 1951. It does two things:

(1) It deprives Congress of the power to impose death and gift taxes and leaves these means of raising revenue exclusively to the states where they belong and where competition among the states would tend to keep the rates within reasonable bounds.

(2) It limits income taxes to a maximum rate of 25 per cent, but permits Congress by a vote of three fourths of the members of each house to exceed that rate without limit. When the top rate exceeds 25 per cent, however, it can be no more than 15 percentage points above the bottom rate. For example, if the bottom rate were 20 per cent, the top rate could not exceed 35 per cent. If the top rate does not exceed 25 per cent, however, there is no restriction at all on the bottom rate. It could be 1 per cent or ½ of 1 per cent.

The revenue from the estate and gift taxes is comparatively trivial. In 1953 it was $891 million. This was a little over 1 per cent of the total budget of $74 billion. It was enough to pay the government's expenses for about four days.

With respect to income taxes, it will be observed that the proposed amendment merely limits the degree of tax rate progression. It does not prescribe the top rate that Congress may impose.

Accordingly, it cannot well be argued that the Amendment impairs the Government's power to raise needed revenue either during war or peace.

Furthermore, it should be borne

in mind that the great bulk of the revenue from the individual income tax comes not from the taxpayers with the large incomes, but from those with the small incomes. Only 3 per cent (about $2 billion) of the total estimated federal revenue of $62.642 billion for the current fiscal year ending June 30, 1955, comes from the individual income tax rates above 34 per cent, which is 14 percentage points above the present beginning rate of 20 per cent. Thirty-five per cent is the highest top rate that could be imposed under the proposed amendment with a beginning rate of 20 per cent.

Contrast these figures with the effect of an increase of only $100 in the present $600 personal exemption and credit for dependents. Such an increase would result in a reduction of 7 million in the number of income taxpayers and a revenue loss of two and one-half billion. This is one-half billion dollars more than the total revenue received from the individual income tax rates above 34 per cent.

There are several points regarding the Amendment which have not, I believe, been discussed, or at least adequately discussed, in any of the previous issues of the JOURNAL.

These I shall deal with briefly.

(1) *Results of a Redistribution of Wealth.*

Attempts are frequently made to justify the very high tax rates on individual incomes on the ground that they effect a redistribution of wealth to the great benefit of the less fortunate. The statistics on this subject are enlightening. Based upon figures taken from a report of former Secretary of the Treasury Snyder to the Ways and Means Committee on February 5, 1951:

1. If the total taxable income, *before* taxes, in the income tax brackets over $6,000 were divided equally among the 155 million people in the country at that time, each person would receive $80.

2. If the total taxable income, *before* taxes, in the brackets over $10,000 were so distributed, each person would receive $50.

3. If the total taxable income, *before* taxes, in the brackets over $20,000 were so distributed, each person would receive $25.

The lesson to be learned from this is that what is needed to improve the lot of the less fortunate is not a redistribution of existing wealth, but the production of more wealth. This can be accomplished only by providing a proper incentive for people to work, save and invest in productive enterprise. Removal, or partial removal, of this incentive by excessive income and death taxes leads to the production of less wealth and defeats the objective of improving the lot of the less fortunate.

(2) *Ultimate Objective of the Amendment.*

The ultimate objective of the Amendment is a top individual income tax rate of 25 per cent, and a beginning rate of much less than 10 per cent. In determining whether such an objective is realistic, it will be helpful to consider the possible tax effect of a budget of more reasonable proportions than the present one. For the current fiscal year ending June 30, 1955, total expenditures are estimated at $65 billion.

According to "The Federal Budget in Brief", expenditures for the years 1951, 1950, 1949 and 1948 were as follows:

	Expenditures.
1951 (which included a full year of the Korean War)	$44.058 billion
1950	39.606 billion
1949	39.507 billion
1948	33.068 billion

Let us suppose now the following changes in the budget receipts as estimated for the fiscal year 1955:

1. A reduction in the individual income tax rates to 10 per cent on incomes up to $10,000 and 25 per cent on the amounts in excess of $10,000.

2. Elimination of estate and gift taxes.

These changes would reduce budget receipts to $47 billion.

A beginning rate of 5 per cent, instead of 10 per cent, on individual incomes would reduce the receipts to $41.5 billion.

It will be observed that the above total of $47 billion of receipts is $3 billion greater than the budget expenditures for the fiscal year 1951, which included a full year of the Korean War, and $7.5 billion greater than the budget expenditures for the fiscal years 1950 and 1949, and that the total of $41.5 billion of receipts is $2 billion above the 1950 and 1949 expenditures, to say nothing of the $33 billion expenditures in 1948.

Prior to 1942, which was a war year, the largest expenditures of the Federal Government in any year were $18.4 billion in 1918, which was also a war year.

It should be borne in mind that adoption of the Amendment cannot be secured overnight. There must first be approval by two-thirds of both Houses of Congress, followed by ratification by the legislatures of three fourths of the states.

It is perhaps not irrelevant to observe that according to press reports, the Committee on Federal Tax Policy headed by Roswell Magill, Under Secretary of the Treasury in 1938, in a private study recently released reached the conclusion that government spending in the 1955 fiscal year can be reduced by $5 billion below the Administration's estimate of $65 billion.

Letter to *Journal* from Austin W. Scott, Jr.

I wish also to answer a letter from Professor Austin W. Scott, Jr., to the AMERICAN BAR ASSOCIATION JOURNAL, published on pages 458 and 459 of the June, 1954, issue of the JOURNAL, in which he ridicules the Reed-Dirksen Amendment and the action of the American Bar Association in endorsing it. He sarcastically observes that

> Actually the proposed amendment is designed to help taxpayers with small incomes, to "give them relief", as the report [of the Association's Special Committee] says, by "increasing revenue through a drastic reduction of the present confiscatory higher bracket rates". . . .

Thus the proposed Reed-Dirksen Amendment (1) gives tax relief to everyone—those in the higher and those in the lower brackets, (2) produces more federal revenue, (3) eliminates communism, and (4) safeguards freedom of the individual. To the ordinary mind it is a little difficult to see how if the rich pay less tax, the poor may pay less; how if everybody pays less tax, the Government receives more revenue; how if the Government receives more revenue it becomes less of a "Government unlimited"; and how by giving tax advantages to the well-to-do we can better oppose communist domination. Yet the powerful composite mind of the American Bar Association has discovered that all this is so. It sounds like quite a proposal!

As to his first two points, Professor Scott is apparently not familiar with the law of diminishing returns, a principle which has long been recognized by students of the subject.

For example, in his book, *Taxation: The People's Business,* published in 1924, Andrew W. Mellon, then Secretary of the Treasury of the United States, said (page 16):

> It seems difficult for some to understand that high rates of taxation do not necessarily mean large revenue to the Government, and that more revenue may often be obtained by lower rates. There was an old saying that a railroad freight rate should be "what the traffic will bear", that is, the highest rate at which the largest quantity of freight would move. The same rule applies to all private business. If a price is fixed too high, sales drop off and with them profits; if a price is fixed too low, sales may increase, but again profits decline. The most outstanding recent example of this principle is the sales policy of the Ford Motor Car Company. Does any one question that Mr. Ford has made more money by reducing the price of his car and increasing his sales than he would have made by maintaining a high price and a greater profit per car, but selling less cars? The Government is just a business, and can and should be run on business principles.

Again, on February 12, 1924, the late President Coolidge, supporting the position which had earlier been taken by President Wilson and three Secretaries of the Treasury—Carter Glass and Secretary Houston, both Democrats, and Andrew Mellon, a Republican—in advocating a reduction in income tax rates, said:

> Experience does not show that the higher rate produces the larger revenue. Experience is all in the other way. . . . The experience of the Treasury Department and the opinion of the best experts place the rate which will collect most from the people of great wealth, thus giving the largest relief to the people of moderate wealth, at not over 25%.

This subject is also dealt with by the Brookings Institute in a study completed in April, 1939, and published as Pamphlet No. 21 under the title, "Taxation and Capital Investment".

More recently, Congressman Daniel A. Reed, Chairman of the House Ways and Means Committee, in a speech published in the *Congressional Record* for Friday, April 2, 1954, at page A3537 of the Appendix, said:

> Advocates of high taxes often ignore the fact that high tax rates do not necessarily mean high tax yields. No matter how high tax rates may be, tax yields will be low unless the economy of the country is in high gear. A tax program should be designed to increase economic activity. If it is so designed, tax yields will remain at a high level, even though rates are lowered. This fact is demonstrated by our experience from 1921 to 1929.
>
> Individual income-tax rates were reduced six times during the 1920's. A comparison of the first two tables annexed hereto shows that the cuts in individual income-tax rates made during the years from 1921 to 1929 did not result in a net loss of revenue. During each of those years not only was the budget balanced but there was a substantial surplus. . . .
>
> Despite these tax cuts, revenues (on a liability basis) from individual income taxes increased from $719,387,106 in 1921 to $1,001,938,147 in 1929—an increase of about 30 percent. A similar percentage increase would bring in about $9 billion of additional tax yields today. . . .
>
> It is significant that during the period from 1921 to 1929, when these tax policies were in effect, the national income increased from $69.5 billion to $83.3 billion. (See table III.)
>
> The conclusion which the experience of the 1920's compels is that judicious cuts in individual income tax rates have the effect of increasing the prosperity of the Nation, and that it is primarily the level of prosperity which determines tax yields, and not tax rates.
>
> In comparing our present situation with the 1920's it should be further borne in mind that today our tax rates in the high brackets are not designed primarily for revenue purposes, but are the legacy of the social philosophies of the New Deal and Fair Deal.
>
> This is demonstrated by the fact that if tax rates were reduced from the present maximum of 91 percent to a maximum of 50 percent the revenue loss (estimated by mathematical projection) would barely exceed $1 billion out of almost $30 billion collected from individual income taxpayers.
>
> It would seem to be unquestionable that tax-rate cuts today would have an even more beneficial effect on the economy than they had in the 1920's when taxes, even in the highest brackets, were a relatively light burden.

Professor Scott's other two points, regarding the elimination of Communism and the safeguarding of the freedom of the individual, have been so fully dealt with in earlier articles published in the JOURNAL that I shall not attempt to deal with them here.

Anyone who will take the trouble to study the subject will, I am confident, arrive at these conclusions:

(1) The heavy progressive rates of the estate and individual income taxes produce comparatively little revenue.

(2) Not only do these rates seriously impair the incentive and ability to work, save and invest in productive enterprise, thereby preventing the formation and supplying of the amount of private capital needed for the successful operation of the private enterprise system, but they will in due time produce less revenue than lower rates.

(3) The ultimate effect of these rates will be to force industry to depend more and more on the Government for its capital, which leads to government ownership and control—in other words, socialism.

(4) For a government to profess to favor a system of private enterprise and then to confiscate by excessively high tax rates the incomes and estates of the successful differs from what we call "robbery" only in form.

Board of Governors' Meeting

October 15-16, 1954

■ The regular fall meeting of the Board of Governors of the Association was held at the new American Bar Center in Chicago on October 15 and 16. The meeting was preceded on October 14 by a hearing conducted by the Board on the subject of specialization by lawyers and the regulation thereof and was followed on October 17 by the annual conference of Section Chairmen of the Association.

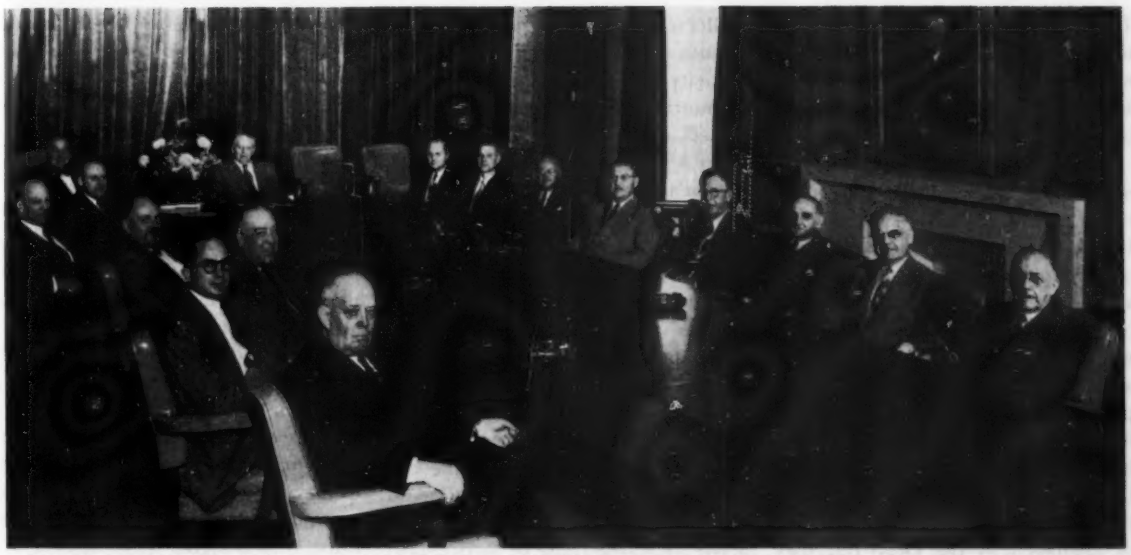
At the specialization hearing, in addition to members of the Board of Governors and other interested persons, the following groups were represented and presented their views: The Association's Sections of Administrative Law; Patent, Trade-Mark and Copyright Law; and Taxation; the Standing Committee on Admiralty and Maritime Law and the Maritime Law Association; the American Patent Law Association; the Chicago Patent Law Association; the American College of Trial Lawyers; the International Association of Insurance Counsel; the National Association of Claimants' Compensation Attorneys; the Probate Attorneys Association, and the Committee on Specialization of the New York State Bar Association. Several groups not represented also indicated that they would file written statements. As a consequence, the Board is holding the entire subject for further consideration and it is not expected that a recommendation will be made to the House of Delegates prior to the 1955 Annual Meeting. In the meantime, the Board will welcome the expression of views by any member of the Association.

Much of the time of the Board was occupied with the consideration of administrative and financial problems arising from the expanding program of the Association and the moving of the headquarters into the new American Bar Center at the end of September. Since these matters will be covered in reports to the House of Delegates, this brief account will be limited to reporting items of general interest emanating from the meeting. Predominant among such items was the Board's action in authorizing the Association's Special Committee on Communist Tactics, Strategy and Objectives to file a brief as amicus curiae on behalf of the Association in opposition to the appeal of Leo Sheiner, of Florida, from an order of the Florida Circuit Court disbarring him from the practice of law because of his refusal to say whether he was a Communist. The Board's action was predicated on a resolution previously adopted by the House of Delegates which declares that "Membership in or adherence to the Communist Party by any attorney is inconsistent with and violates his fundamental oath of office", and goes on to urge state and local bar associations to institute appropriate investigations and disciplinary proceedings against attorneys who invoke the Fifth Amendment in court or before legislative committees.

While recognizing that any citizen has the constitutional right to refuse to testify on the ground of possible self-incrimination, the Board agreed with Judge Vincent Giblin of the Florida Circuit Court that no citizen has any constitutional right to practice law and that the lawyer's responsibilities under the Constitution go beyond those of the non-lawyer.

Another item of business which may be characterized as administrative in nature but which is of special interest to the profession in this country and abroad was the decision to recommend to the House of Delegates that a portion of the 1957 Annual Meeting be held in London, England, in acceptance of the invitations received sometime ago from the Law Society and the General Council of the Bar of England. Plans under consideration contemplate holding a portion of the 1957 Annual Meeting in a city on the eastern seaboard of the United States with an adjournment to London. It is felt that the visit of American lawyers and judges to Britain will serve to cement the ties of friendly relations and understanding between the legal professions of the two nations and to develop closer contacts with bar organizations in other free nations in the interest of international good will and a wider appreciation of the Anglo-American system of equal justice under law.

Coincidentally, the Board also approved a request of the Association's Section of Judicial Administration that it be authorized to sponsor a study of the Metropolitan Trial Courts of London in carrying forward the Section's program of metropolitan trial court surveys now in its fifth year. It is expected that the study will be conducted by the Institute for Advanced Legal Studies at the University of London without cost to the Association and will afford a valuable basis of comparison in connection with the studies heretofore conducted and hereafter to be conducted in this country, all of which have as their objective the improvement of the administration of justice in these important courts.



Seated around table clockwise: A. L. Merrill, Pocatello, Idaho; Elwood H. Hettrick, Boston, Massachusetts; Thomas M. Burgess, Colorado Springs, Colorado; Osmer C. Fitts, Brattleboro, Vermont; Tappan Gregory, Chicago, Illinois, Editor-in-Chief of the *Journal*; Harold H. Bredell, Indianapolis, Indiana, Treasurer; John D. Randall, Cedar Rapids, Iowa, Chairman of the House of Delegates; President Loyd Wright, Los Angeles, California; Joseph D. Stecher, Toledo, Ohio; Secretary; Whitney R. Harris, Chicago, Illinois, Executive Director of the Association; Joseph D. Calhoun, Media, Pennsylvania, Assistant Secretary; Herbert G. Nilles, Fargo, North Dakota; Richard P. Tinkham, Hammond, Indiana; Blakey Helm, Louisville, Kentucky; William J. Jameson, Billings, Montana, Last Retiring President, and P. Warren Green, Wilmington, Delaware.

Perhaps without precedent was the solemn obligation imposed by the hand of fate upon the Board to recognize in a single meeting the great loss of three distinguished leaders of the legal profession and devoted members of the American Bar Association. Memorial resolutions were adopted for former President George Maurice Morris, who died on August 21, Senator Patrick Anthony McCarran, who died on September 28, and Justice Robert H. Jackson, of the United States Supreme Court, who died on October 8. These resolutions are not repeated here, but each records the Association's recognition and appreciation of the devotion of these distinguished leaders of the Bar to the highest ideals of our profession and their unstinting service to that profession and to our nation.

While not a part of the formal proceedings of the Board, the highlight of the meeting was without doubt the brief but most impressive ceremonies which were conducted on Friday, October 15, dedicating the beautiful meeting room of the Board in the American Bar Center. This room was contributed by the United States Steel Corporation in honor of Nathan L. Miller, of New York, former governor of that state and a former member of its Court of Appeals. Particularly gratifying to all who attended was the presence of three of Governor Miller's daughters to hear the eloquent and inspiring tribute paid to him by Roger M. Blough, Vice Chairman of the Board and General Counsel of United States Steel Corporation. On this significant occasion, Mr. Blough said in part:

"We are met in this great American Bar Center to dedicate its Board of Governors' Room in honor of Nathan L. Miller, distinguished jurist, lawyer, and former Governor of the State of New York.

"Those who guide the Bar Center in the performance of its high purposes have accorded me a privilege not to be taken lightly. I am truly grateful. For mine is the privilege today of participating in the dedication of a gracious and useful monument—not one that is austere and arid of purpose—to a man whose probity might well serve as a model for every member of the Bar; whose clarity of thought commanded admiration, and whose industry and moral courage in behalf of causes he believed in won, from colleagues and adversaries alike, the deepest respect. There was no chink in the armor of his personal rectitude or professional competence.

"Those who have made possible the creation of this Board of Governors' Room in which we are gathered, should feel secure in the knowledge that they have paid honor to Nathan L. Miller in a singularly fitting way. For within this citadel evidencing the strength of the law and our faith in it, they have helped to bring into being a place of deliberation and decision destined to advance in service to society the profession he served with such complete dedication.

• • •

"But I do want to talk about the qualities Nathan L. Miller possessed.

They serve as a lodestar of inspiration and emulation for those of us who today are members of the Bar and those who in years to come will be.

"Among the attributes of Governor Miller, I would give first rank to his aggressive intellectual honesty. He did not know how to equivocate or dissemble. He never left you in any doubt of where he stood on any issue. His loyalty to his convictions was complete and steadfast. He was as articulate as any man I ever heard plead a case; but I think he never incorporated the word "vacillate" in his vocabulary. Yet he was not an intransigent man, a man of mental inflexibility. He could be persuaded or dissuaded by the facts; but they had to be the facts.

* * *

"Nathan L. Miller was a public servant, in humble office and in the topmost one to which the voters of our most populous state can elect a fellow citizen. He was a jurist on the highest tribunal of his state; and, but for a sense of deep personal obligation to his family, which precluded his acceptance, he would have been a justice of the Supreme Court of the United States. He was a practicing lawyer whose standing at the bar is attested by the honor done his memory today.

"In all those capacities, Governor Miller exemplified, I believe, an attribute of our national character, a capacity of the American people amounting to genius, which has lacked the appreciation it merits. That is the peculiarly American talent for utilizing the uniquely American freedom of action and decision to form voluntary associations for spiritual, social, political and economic purposes.

"Our temporal world has never seen, nor is it likely to see in the future, a finer basis of organization than the one which brought into being the "more perfect union" that is our United States. Men of the law had an important hand in that. And while they must be consecrated above all to the cause of justice, lawyers—trained in organizing facts—contribute much to organizing in every aspect of our daily life, so that the fruits of scientific research, technological innovation, and advances in the fields of political science and social welfare, may be brought to all the people.

* * *

"In the small part I am so pleased to take in this ceremony, it is my deep purpose to convey to you something of the veneration that I and my associates in the United States Steel Corporation felt for the man who was our General Counsel for twenty-eight years, and whose name we are met here to honor today. Many years of close association with Governor Miller nourished an esteem for his wisdom, his penetrating judgment, and his constructive counsel which my words can only falteringly and inadequately express.

"What we in trust dedicate here today, in honor of a man, are the personal qualities he possessed and the qualities he strove to instill in all others whose lives he touched: unswerving devotion to God; uncompromising loyalty to his republic; unimpeachable personal and professional rectitude; unclouded clarity of thought; unflagging industry in the quest of truth; brilliance in advocacy, and fearlessness in defense of the cause that is right.

"In a larger sense, we know his qualities, his works, his faith, his achievements were but a reverberation of American legal tradition from the splendid mind and stout heart of this man.

"In a larger sense, then, we do, therefore, dedicate this room, to the preservation of free institutions, to the strength of patient reason, to the conquest of insincerity, to the unremitting battle for individual freedom, and to the law as a living force in that endless crusade for human liberty.

"May this room, which honors the memory of Nathan L. Miller, be devoted always to this cause."

Lawyers Asked To Co-operate on S-D Day

■ Is it possible for every community to remain completely free from traffic accidents for a twenty-four hour period?

The answer will be supplied on Wednesday, December 15, 1954, which has been designated as S-D Day by the President's Action Committee for Traffic Safety. Support is being given by all major national organizations interested in traffic safety. Direct participation by the automotive, insurance, transportation and related fields of industry has been assured. This is to be implemented by activity to be undertaken by civic, fraternal, labor, professional, religious, school, social and women's groups and motor clubs.

The Traffic Court Program of the American Bar Association will urge all traffic court judges and prosecutors to assist this worthwhile movement. State and local bar associations will be asked to bring this program to the attention of their members.

Individual lawyers, as motorists and pedestrians, will be alerted on S-D Day to accept full, personal responsibility for these basic safety principles:

1. Observe the letter and spirit of all traffic laws and regulations.
2. Be courteous to every other driver and pedestrian.
3. Give full attention to driving and walking as they would have everyone else drive and walk.

S-D Day will be the biggest, single cooperative effort ever undertaken on behalf of traffic accident prevention. All lawyers should do their part to make S-D Day a successful, accident-free event.

For further information, write the Traffic Court Program, American Bar Association, 1155 East Sixtieth Street, Chicago 37, Illinois.

Improving Our Legal Writing:

Maxims from the Masters

by **Eugene C. Gerhart** · of the New York Bar (Binghamton)

■ **A new group of lawyers, the Scribes, dedicated to improving the style of legal writing, may one day become a potent foe of "legalese". Mr. Gerhart offers some sage counsel from many masters of the English tongue that every one of us can ill afford to ignore.**

■ "Nature's chief masterpiece", we are told "is writing well."[1] How do we lawyers rate in the literary field?

A few years ago Harvard Law School's Edward H. Warren[2] sounded his bugle for an assault upon current legal literary style with this clarion call:

> The literary style, or lack of literary style, of many judges, professors of law, and editors of, and contributors to, law reviews is deplorable (or, at least, it so seems to me). What is the trouble? Three sources of trouble may be mentioned: (1) sloppy thinking; (2) a love for "half-tones"; (3) a love for resounding words and expressions.[3]

Professor Warren's blast may have helped to rally a band of legal writers who have recently been organized. "Scribes" is the name of this new group. Two of the principal goals of the Scribes are:

First: To develop an interesting way of writing.

Second: To develop a clear, succinct and forcible style.

It would be presumptuous for any lawyer or group of legal writers to lay down *the formula* for legal writing. The reader may recall the story of the Persian philosopher. Upon being asked by what method he acquired so much knowledge, he answered, "By not being too proud to ask questions where I was ignorant." By adopting his attitude we may be able to find some valuable hints which will improve our own legal writing.

To achieve the first goal of the Scribes, developing an interesting way of writing, we should first know what makes reading interesting. Rudolph Flesch in his recent book, *The Art of Readable Writing*,[4] gives us a clue. He states that "readability" means ease of reading *plus* interest. "Structure of words and sentences has to do with one side of readability, 'personal words' and 'personal sentences' with the other", says Flesch.[5]

Lawyers' language has long been regarded as the prime example of complex, unreadable, often unintelligible English. Such phrases as "legal technicality", "fine print", "lawyers' Mumbo-Jumbo", etc., should be a warning to legal writers. Maury Maverick summed it up in a new word he coined himself—"gobbledygook!"[6] If the function of writing is to inform or to persuade, the writer fails unless his words convey ideas to his readers. In the best writing the reader follows the author's ideas effortlessly, without being conscious of the writer's words. Complex words impede the transmission of the author's ideas to the reader's mind. Don't you think lawyers sometimes forget that the purpose of language is to *reveal* thought, not to conceal it?

"Short words are best and the old words when short are best of all", says Sir Winston Churchill.[7] He is no mean authority himself, since he won the Nobel Prize for Literature in 1953. Long words are notoriously hard to read. Fancy words are often merely evidence of pompous pride of knowledge. If we want our readers to find our legal writing interesting we must use plain language, and follow Carlyle's advice: "Be not the

1. "An Essay on Poetry" in 1 *The Works of John Sheffield, Duke of Buckingham* (3d ed.; London: T. Wooton, 1740), page 127.

2. Professor Edward H. Warren of Harvard Law School was affectionately known to his students, including the author, as "Bull". He was one who believed in discipline. He did not suffer fools gladly. He called his short review of the best of his life work, *Spartan Education* (Boston: Houghton Mifflin Company, 1942). President Conant of Harvard University said of him: "Your work has been unique and your fame as a great teacher and master of the science of law has extended throughout the English-speaking world." *Spartan Education*, facing page one.

3. *Spartan Education*, page 29.

4. New York: Harper & Brothers, 1949.

5. *Id.* at 145.

6. Flesch, *The Art of Plain Talk* (New York: Harper & Brothers, 1946), page 123 ff. See also Lederle, "What the Public Has a Right To Expect of the Courts," 26 *N. Y. State Bar Bull.* 319 (October, 1954) at 321-22.

7. Coote, C. R., and Bunyan, P. D., *Sir Winston Churchill: A Self Portrait* (London: Eyre & Spottiswoode, 1954), page 142.

slave of Words."[8]

After words come sentences. Churchill tells us that he learned English under the tutored eye of a Mr. Somervell. "I learned it thoroughly", he says. "Thus I got into my bones the essential structure of the ordinary British sentence—which is a noble thing."[9]

We lawyers have dealt harshly with this noble thing. We stand accused of being the "one profession that thinks it can't live without long sentences."[10] The trouble with long sentences is that they become so complex that they are not readily understandable. If they are not readable, how can they be interesting? If you doubt me, take a look at Section 23 (p) of the old Internal Revenue Code. The first sentence of that taxpayers' nightmare contained 438 words! Congress unfortunately has just expanded this literary monstrosity in the new Code to more than 450 words![11]

Flesch tells us that the average number of words in the standard English sentence is seventeen. Very difficult writing contains twenty-nine words or more per sentence. We must take more seriously Mr. Justice Cardozo's advice: "There is an accuracy that defeats itself by the overemphasis of details. . . . The sentence may be so overloaded with all its possible qualifications that it will tumble down of its own weight."[12] The French say that "The art of being a bore is to tell every detail."

Fine writing involves more than words and sentences. "Fine writing, according to Addison, consists of sentiments which are natural, without being obvious. There cannot be a juster and more concise definition of fine writing", wrote David Hume.[13] To this Shenstone adds: "Fine writing is generally the effect of spontaneous thoughts and a labored style."[14] Again Churchill summarizes my point well in these words:

> I began to see that writing, especially narrative, was not only an affair of sentences, but of paragraphs. Indeed I thought the paragraph no less important than the sentence. Macaulay is a master of paragraphing. Just as the sentence contains one idea in all its fullness, so the paragraph should embrace a distinct episode; and as sentences should follow one another in harmonious sequence, so the paragraphs must fit on to one another like the automatic couplings of railway carriages . . . . Each chapter must be self-contained. All the chapters should be of equal value and more or less of equal length. . . . Finally the work must be surveyed as a whole and due proportion and strict order established from beginning to end.[15]

Sir Winston concludes that, "Good sense is the foundation of good writing."[16]

So much for our first point.

We lawyers realize we must adapt our style to our various audiences. But whoever our audience, a clear, succinct and forcible style is the ideal we aim at.

How shall we attain such a style?

Less Abstraction Is the Key to Clarity

Daniel Webster observed that "the power of clear statement is the great power at the bar".[17] Rufus Choate said that, "The best argument on a question of law is to state the question clearly."[18] Legal writers often deal in abstractions. Abstract concepts are usually vague because no word ever means exactly the same thing to two different people. Our writing cannot remain at the abstract level for long and still be clear. We find the remedy in the case method. We can guide our readers to the conclusions we have in mind if we put concrete cases as examples after our abstract statements. It is not amiss to recall that the Master Himself taught by parables. We lawyers might well give those ancient abstract litigants, John Doe and Richard Roe, more modern names. They would become more human and more interesting. Our old friends, *A*, *B* and *C* are hard to picture as flesh-and-blood men and women. Dickens has proved that symbolic and catchy names—even of legal characters—can be made to live indelibly in readers' memories. When we make our writing less abstract and more personal, we also make it clearer, more readable and therefore more interesting.

A clear style is one that is sincere, simple, coherent and direct. It results from exactness in the use of specific words. Richard C. Borden in his excellent work, *Public Speaking —As Listeners Like It!*[19] believes that clarity is the most important element. Says Borden: "If your speech phraseology is clear, you gain more than clarity. To be clear is also to be convincing."[20]

The Scribes have made succinctness another of their ideals of style. Many lawyers suffer from a literary disease called "sentence inflation". They love sesquipedalian words. Verbosity is their habit of mind and

8. *Sartor Resartus*, Book 1, Chapter VIII.

9. *A Roving Commission*, page 17.

10. Flesch, *The Art of Readable Writing*, at page 111, and *The Art of Plain Talk*, page 36. Legal *literary* writing must, of course, be distinguished from the *drafting* of legal documents. In statutes, conveyances, contracts, etc., *certainty* is the paramount aim of the draftsman rather than attractive legal style. "Drafting is more a science than an art; it lies in the province of mathematics rather than of literature, and its practice needs long apprenticeship." Gowers' *Plain Words: Their ABC*. (New York: Alfred A. Knopf, 1954, page 18).

11. See Section 404 of I.R.C. revision of 1954. Lawyers must yield the palm to Nobel Prize winner (1950) William Faulkner, however. His latest book, *A Fable* (New York: Random House, 1950) contains one sentence which is more than a page and one-half long. Faulkner's sentence contains more than 690 words! Pages 50-52. Philosophers are just as bad! See Blanshard, "Philosophical Style," in the *Yale Review* (September, 1953), page 547.

12. *Law and Literature in Selected Writings of* Benjamin Nathan Cardozo, edited by Margaret E. Hall (New York: Fallon Publications, 1947), page 341.

13. Essay, *Of Simplicity and Refinement in Writing*.

14. William Shenstone, Essay, *On Writing and Books*.

15. *A Roving Commission*, pages 211-12.

16. *Id.* at page 212.

17. Harvey, *Reminiscences and Anecdotes of Daniel Webster* (Boston: Little, Brown and Company, 1877), page 118. "Mr. Matthew Arnold once said to me: 'People think that I can teach them style. What stuff it all is! Have something to say, and say it as clearly as you can. That is the only secret of style.' " Russell, G. W. E., *Collections and Recollections* (New York: Harper & Bros., 1898), page 136.

18. As quoted by Judge Harley N. Crosby in his article, "Mistakes Commonly Made in the Presentation of Appeals", in Schweitzer's *Trial Guide* (New York: Baker, Voorhis & Co., Inc., 1945), Volume III, page 1546. John W. Davis agrees that clarity is the forte of the great advocate. John W. Davis to E. C. Gerhart, December 10, 1951.

19. New York: Harper & Brothers, 1935.

20. *Id.* at page 89. Professor Warren believed that "the best way to be persuasive is to be simple, 'clear, and terse.' " *Spartan Education*, page ix.

expression. Perhaps this is a hangover from those days in England when the master and his clerks were paid by fees and, as Holdsworth tells us, "every warrant, every copy, every report, indeed every proceeding carried its fee. . . . Then, too, we must remember that it was to the interest of everyone concerned to increase the length of all these documents, because increased length meant increased profit."[21] Dickens' *Bleak House* tells us that story well! The cure for "sentence inflation" is to stop being stuffy, legalistic, technical and overly precise in our writing for the general reader.

Mr. Justice Holmes once gave a long-winded lawyer some advice on succinctness. He interrupted the wordy advocate with this question:

"Counsellor, do you read French novels?"

"No, Your Honor. I do not", the lawyer answered.

"Well," replied Holmes, "I recommend them to you. You'll learn to say a lot by innuendo."

In his later years Holmes wrote his opinions *standing up*, commenting that, "Nothing conduces to brevity like a caving in of the knees."[22]

The third of the Scribes' ideals is a "forcible style".

Flesch tells us that: "Psychologists have used the ratio between adjectives and verbs for years to measure the forcefulness of writing; writing teachers have been preaching the gospel of the active verb ever since anybody can remember."[23] It seems that the inactive, the intransitive, the impersonal style is preferred by lawyers. Inactive style is not forceful: It is weak. Use active verbs. Watch your adjectives. Use a sharp-pointed blue pencil to strike out as many words as you possibly can without altering the sense, and you will increase tremendously the vigor of your style. Dr. Johnson's only rule for writing was this: "Read over your compositions, and when you meet with a passage which you think is particularly fine, strike it out."

If we are to be forceful we must avoid pedantic slavery to grammatical rules. Jefferson said that, "Whenever by small grammatical negligences the energy of an idea can be condensed or a word be made to stand for a sentence, I hold grammatical rigor in contempt."[25] To occasionally split an infinitive may enable you to better organize your material and to more effectively state your case. Otherwise you may be sacrificing sense to mere sound. Our English language gives us "the inestimable advantage of being able to put adverbs where they will be most effective, coloring the verbs to which they apply and becoming practically part of them. . . . If you think a verb cannot be split in two, just call the adverb a part of the verb and the difficulty will be solved."[26]

On Using Prepositions To End Sentences

Today English teachers believe that a preposition may be a good word to end a sentence with. And why not? When Churchill was criticized for such a prepositional "error", he snorted: "This is the type of arrant pedantry, up with which I shall not put."[27] Neither will any other good Scribe!

Professor Warren did not limit his observations on legal literary style to caustic criticism. He left behind some genuinely constructive suggestions. He estimated that he had written more than 10,000 printed pages during his years in the law. "There is nothing else that I have written that I so much desire should have a wide, enduring influence as the first two pages in the preface to the treatise on *Margin Customers*",[28] he wrote in his legal testament, *Spartan Education*.

He advised legal writers to stop trying to impress people by the use of long words, or words with which the ordinary man is unfamiliar. We can all profit by the advice this legal disciplinarian gave his students on effective juristic style. Here it is:

1. Never dictate anything which calls for careful thinking. Write out everything (except quotations) in longhand. If you dictate, you are likely to get into a habit of using words of many syllables like "formulated" or "constituted." If you write in longhand you are likely to get into a habit of using words of one syllable like "made" or "was."

2. Make it a habit of life to spend ten minutes a day in reading something in the Psalms or Proverbs or Gospels; and treasure the short, terse, depicting, dynamic, devastating words and expressions.

3. See to it that not less than sixty-six per cent of your words are words of one syllable, and that not less than eighty-three per cent are words of one or two syllables.

4. Go over the drafts as they come back from the typist and rub and rub and rub again until you have massaged away every muddy word and every waste word.

5. If you are dealing with a tough juristic topic, lighten the strain from time to time. If one page has to contain a headache, balance it with another page that contains a smile. A joke may be the most effective of arguments, and the most dignified dignity is an unstilted dignity.

6. *But* avoid being "cheap" as you would shun the plague. You are living in a picture age; picturesqueness is the order of the day. All right, adapt yourself, be picturesque; but *never* be cheap. And be keenly conscious of the fact that the line between the picturesque and the cheap is *not* a bright line.

7. Let learning be your servant, not your master; the deepest learning is the learning that conceals learning. The bread of an idea is worth more

21. 9 Holdsworth, *History of English Law*, pages 361-64. See also Holdsworth, *Dickens as a Legal Historian* (New Haven: Yale University Press, 1928), page 99.

22. Bowen, *Yankee from Olympus* (Boston: Little, Brown & Company, 1944), page 324.

23. Flesch, *The Art of Readable Writing*, page 134.

24. Flesch, *The Art of Readable Writing*, page 187.

25. As quoted in Palmer, *Self-Cultivation in English* (Boston: Houghton Mifflin Company, 1925), page 18.

26. Frank W. Grinnell, Editor-in-Chief of the *Massachusetts Law Quarterly*, reprinted an interesting letter of the late Joseph Lee from which this quotation is taken, in 37 Mass. L. Quar. 65-66 (July 1952). Mr. Lee adds: "If you insist upon your Latin indivisible infinitive, you render the higher emphasis of English speech and literature impossible."

27. Flesch, *The Art of Readable Writing*, pages 136-37.

28. He published his treatise, *Margin Customers*, in 1941. It was distributed by the Plimpton Press, Norwood, Massachusetts. The quotation above is from his *Spartan Education*, page 30.

than a stone of information. Do not spread out in full your laboratory notes. Do not be *magis in operatione quam in opere*. Appraise your "productivity," not by quantity, but by quality. Read much, discuss much, ponder most, write a little.[29]

Sir Walter Scott's productive facility and his rapidity of writing amazed everybody. What he produced was excellent. A faculty for ready writing is valuable, but intense thought should precede rapid writing. "And herein truly lies the secret of the matter:" Carlyle confides, "such swiftness of mere writing, after due energy of preparation, is doubtless the right method".[30]

What is easily written is seldom easily read! Sheridan's well-known couplet is a constant warning to intellectuals:

You write with ease,
to show your breeding,
But easy writing's
curst hard reading.[31]

This is doubtless what led Professor Warren to confess that, "Before I finish a law review article, I sweat blood for a month."[32]

An excess of mediocre writing is a literary offense. No author envies the fate of the Etruscan writer, Cassius, who poured out two hundred lines before lunch each day and the same number after dinner. Horace tells us that Cassius "was burned on a funeral pyre made of his own books in their covers"![33]

Since perfection is unattainable, the indispensable art in writing is knowing when to quit; "how to get done", as Carlyle put it.[34] "Too much painstaking speaks disease in one's mind, as well as too little. The adroit sound-minded man will endeavor to spend on each business approximately what of pains it deserves; and with a conscience void of remorse will dismiss it then."[35]

What is the reward the legal writer should seek in this finest of fine arts? Whom should the author seek to please? To what critic should he listen most attentively? Emerson's counsel is this: "The way to speak and write what shall not go out of fashion is to speak and write sincerely. . . . He that writes to himself writes to an eternal public."[36]

Here is the advice of a two-thousand-year-old Roman writer whose works are still published today by the Modern Library:

> You must make frequent use of the eraser if you want to write something that deserves a second reading. You must not be concerned for the admiration of the multitude, but must be satisfied with readers who are discriminating but few.[37]

Young Holmes liked Horace's advice. After his classic, *The Common Law*, appeared in 1881, Holmes wrote his friend Pollock: "I hope you will read my book. It cost me many hours of sleep and the only reward which I have promised myself is that a few men will say well done."[38]

Sleepless hours! Writing, like law, like art, is a jealous mistress. Literary fame is won by giving care and attention to those trifles which make for perfection. But perfection itself is no trifle!

> There is no luck in literary reputation. They who make up the final verdict upon every book are not the partial and noisy readers of the hour when it appears; but a court as of angels, a public not to be bribed, not to be entreated, and not to be overawed, decides upon every man's title to fame. Only those books come down which deserve to last.[39]

Whatever literary fame may come to any Scribe, he should not ignore Holmes' caution: ". . . as long as one continues to write, the question is always of tomorrow and not of yesterday, and tomorrow one may show what a fool one is. So one's head does not swell beyond the dimensions of one's hat."[40]

Perhaps the formula for legal writing is that there is no such formula. Writing itself is an art, not a science to be reduced to mechanical rules. The judge or advocate in the process of exposition, wrote Justice Cardozo, "is practicing an art".[41] Writing is like painting a picture or planning a battle. The techniques and the strategy will be governed by the facts and circumstances of each case. The best writers, like the best artists and the best generals, will achieve their results without being mastered by the rules. This is true because nothing takes the place of an intelligent judgment applied to a given set of facts. Were it otherwise, writing would be reduced to a drill-book exercise instead of the art that it is.

In conclusion, we can smile at old Ben Franklin's verse:

If you would not be forgotten,
As soon as you are dead and rotten,
Either write things worth reading,
Or do things worth the writing.

Writing is one of the few means by which we can respond to that innate desire we all have to be remembered. An art is best taught by example. Yet, lest we become mere imitators we must keep in mind Holmes' admonition: "The best style that a man can hope for is a free, unconscious expression of his own spontaneity, not an echo of some one else. Therefore, although one can learn by reading, the help is only indirect."[42]

If we are to leave behind something worth reading, we shall do well to analyze and emulate the best work of the best writers we know. Perhaps in that way we may leave some spark of inspiration to those who come after us, so well written that they shall not willingly let it die. That is immortality!

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29. *Spartan Education*, page 31.
30. Essay, *Sir Walter Scott*, in 25 The Harvard Classics, 409 at page 461.
31. Moore, *Memoirs of the Life of the Right Honourable Richard Brinsley Sheridan* (3d ed.; London: Longman, Hurst, Rees, Orme, Brown and Green, 1825), Volume I, page 55. See also, Carlyle, *Sir Walter Scott*, 25 The Harvard Classics, at page 460.
32. 58 *Harv. L. Rev.* at 1115 (1945).
33. Essay, "An Answer to Critics" in *The Complete Works of Horace* (New York: Modern Library, 1936), page 39.
34. Carlyle, *Sir Walter Scott*, in 25 The Harvard Classics, at page 460.
35. *Ibid.*
36. Emerson, Essay, *Spiritual Laws*.
37. *The Complete Works of Horace*, edited by C. J. Kraemer, Jr. (New York: Modern Library, 1936), page 39.
38. *Homes-Pollock Letters* (Cambridge: Harvard University Press, 1946), Volume 1; page 17; see Bowen, *Yankee from Olympus* (Boston: Little, Brown & Company, 1944) pages 283-284.
39. Emerson, Essay on *Spiritual Laws*.
40. Homes-Pollock Letters, Volume II, page 211.
41. *Law and Literature in Selected Writings*, page 356.
42. *Justice Holmes to Dr. Wu*, October 7, 1923.

Antitrust Treble-Damage Suits:

The Government's Chief Aid in Enforcement

by **Benjamin Wham** • of the Illinois Bar (Chicago)

■ **Mr. Wham writes in opposition to what he calls a "determined although almost secret battle" to limit the provisions in the Sherman Act and the Clayton Act providing mandatory treble damages in private antitrust cases. He points out that such antitrust suits are long and costly legal wars and that the treble-damage provision is needed to make it worth the effort of the private citizen to bring suit against a violator.**

■ A determined, although almost secret, battle for high stakes is being waged in Congress to amend the provisions in the antitrust acts for mandatory treble damages in private suits in a desperate attempt to limit recovery to compensatory damages with certain provisos.[1]

The provisions for treble damages appear in Section 7 of the Sherman Act of 1890 and Section 4 of the Clayton Act of 1914. They provide that a person injured in his business or property by any other person or corporation because of violation of the antitrust acts shall recover threefold the damages sustained, the costs of suit and a reasonable attorney's fee.

The chief reason for the inclusion of these provisions was to induce private plaintiffs to bring these suits as an aid to the Government in the enforcement of the antitrust laws. This incentive was needed because these suits are long, involved, arduous and expensive and often endanger the business lives of plaintiffs. Individual plaintiffs and individual lawyers are frequently pitted against a multi-million dollar industry represented by the largest and most skillful law firms; and the unsuccessful plaintiff becomes subject to the recriminations of an irate industry which could even result in putting him out of business. Because of these hazards, even with the incentive of treble damages, very few suits were filed under the Sherman Act. As it was patently impossible for the Government single-handed to police all industry in the enforcement of the antitrust laws, it became necessary to strengthen the provisions for private treble-damage suits.

Accordingly, Section 5 was added to the Clayton Act of 1914 to enable the private litigant to use a government judgment or decree to prove a prima facie case of conspiracy. Section 5 also tolled the statute of limitations during the pendency of the Government's suit. Additional help was given plaintiffs in the preparation of their cases by the improved discovery provisions of the Federal Rules of Civil Procedure of 1938.

A further incentive has been given to plaintiffs by tax rulings to the effect that two thirds of the recovery, whether by settlement or judgment, is a penalty and not income and not subject to income tax.[2] If plaintiffs were forced to advance attorney's fees and costs over many years and then pay taxes on the full recovery in one year, they would have hardly enough left to make the gamble worth while.

Another almost insurmountable difficulty confronting plaintiffs in these suits was how to prove damages. It was impossible for the plaintiff to compare the plaintiff's earnings in an open market with its earnings while operating under the alleged conspiracy because the defendants had destroyed the open market. The Supreme Court in *Bigelow* v. *R.K.O.*[3] in 1946 greatly simplified this problem. In that case the trial court permitted the plaintiff to rely on inferential and comparative evidence and the Supreme Court sustained on the ground that the wrongdoer should bear the risk of the uncertainty which his wrong had created.

As a result of these aids treble-

1. H. R. 4597, 83d Congress.
2. *Commissioner of Internal Revenue* v. *Goldman Theatres and Same* v. *Glenshaw Glass*, 211 F. 2d 928. (3d Cir. 1954).
3. 327 U.S. 251.

damage suits have increased and a few have resulted in substantial recoveries.

These suits have had a salutary effect in inducing compliance with the antitrust laws. Former Assistant Attorney General Graham H. Morison, who was in charge of the Antitrust Division, testified that without private suits Antitrust Division appropriations would have to be more than quadrupled to plug the gap.[4] Present Assistant Attorney General Stanley N. Barnes, in charge of the Antitrust Division, has recently pointed out the deterrent effect of treble damages as reflected in the number of consent decrees. Section 5 of the Clayton Act exempts consent decrees entered before evidence is taken from use by private litigants as prima facie evidence of conspiracy. Judge Barnes quotes with approval statistics showing that two thirds of the consent decrees are entered prior to the taking of testimony.[5]

Patently the fear of such suits is a powerful deterrent; a fine of $5,000 can be shrugged off, but a large judgment takes the profit out of the illegal venture. This no doubt is the major incentive for the continuing effort to do away with mandatory treble damages.

Treble Damages as an Incentive to Plaintiffs

Proponents of the change say that treble damages are no longer needed as an incentive to plaintiffs. They cite the use of government decrees to establish a prima facie case of conspiracy. They point to improvements in procedural laws and rules. They emphasize the greater ease in proving damages following the *Bigelow* case. The most recent argument is that antitrust laws are uncertain and it is difficult to avoid violating the law even with the best of intentions, and it is therefore unjust to subject violators to treble damages for what may be an innocent violation. They say this penalty should be imposed only for willful violations.[6]

They also seek to limit these suits by a federal statute of limitations. At present they are governed by state statutes, under the doctrine of the *Erie* case, subject to being tolled by Section 5 of the Clayton Act as above.

It may be said in reply that the argument as to the ease of recovery is like the report of Mark Twain's death, greatly exaggerated. To be sure there are some large judgments. That is true also in the personal injury field. Treble-damage suits have been most successful against the movie industry which is the strongest advocate of the amendment. As one plaintiff's attorney said "They have lost so they want to change the rules". However, more recently, it would appear that the tide has turned. *Theatre Enterprises* v. *Paramount* in 1954[7] points the way to defend against these suits. There is nothing novel in the law in that case as Section 5 of the Clayton Act only provides that government decrees are "prima facie" evidence of conspiracy. The new feature was that the defense successfully rebutted this prima facie case before the jury.

In contrast to the movie industry, litigation in other industries has generally failed. Thus in the oil industry, following the government decree of 1940, over forty private treble-damage suits were filed against oil companies. These were generally unsuccessful. The same may be said of suits in the automobile field. Following the criminal conviction of General Motors and its financing subsidiary in 1941, a flurry of private suits were filed but were uniformly unsuccessful. In the seven suits against General Motors, for example, only four plaintiffs reached juries. The one plaintiff jury verdict was reversed by the Supreme Court, but no subsequent action has occurred.[8]

In a compilation in the *Yale Law Journal*[9] it appears that 25 per cent of all actions are eventually settled out of court. It is stated that movie litigation is excluded from this compilation to avoid duplication of replies, but it is understood that a higher percentage of settlements is made of movie cases.

Proponents of the proposed change to compensatory damages with discretionary treble damages to be assessed by the court only for willful violation of the antitrust laws appear to this writer to be somewhat disingenuous in their arguments to the congressional committees. They fail to point out that when discretion is left to the courts, judges seldom assess more than actual damages, and that only the incentive of treble damages induces the filing of most cases. As stated, it is the additional two-thirds recovered as a penalty, free from income tax, that makes these suits financially worthwhile to plaintiffs.

They also fail to point out the body blow this amendment would deal to the deterrent effect of the present law. The difference between single and treble damages would not only reduce the deterrent effect on violations but would undoubtedly greatly reduce the number of consent decrees now obtained in large part prior to the taking of evidence because of fear of the use of a decree entered after evidence to establish a prima facie case of conspiracy. They also fail to acknowledge that antitrust laws are becoming less uncertain with each court and commission decision, and that the Department of Justice and the Federal Trade Commission have an enlightened approach designed to clarify the law by conference and otherwise.

It is therefore difficult to understand why, after the provisions for mandatory treble damages have had the determined support for many years of government officials who were charged with enforcement of the antitrust laws, the present Attorney General has informed the congressional committee that the Justice

4. Hearings on H. R. 3408, 82d Cong. 1st Sess., 42 (1951).
5. Proceedings at the spring, 1954, meeting of the Section of Antitrust Law.
6. See hearings on H. R. 4597, *supra*.
7. 98 L. ed. 197.
8. 61 *Yale L. Jour.*, June-July, 1952, 1010, at 1046 *et seq.*
9. *Idem.* at 1065.

Department will not oppose this change.[10] On the other hand, it is heartening to note that Edward F. Howrey, Chairman of the Federal Trade Commission, has stated to the congressional committee that:

> The Commission believes that the present mandatory triple-damage provision of the Clayton Act is a deterrent to violations of the anti-trust laws. The proposed amendment may operate to lessen the salutary effects of the present provision by reducing, on the one hand, the incentive to those who are damaged by law violations to incur the risks of suit therefor, and by removing, on the other hand, the certainty of punitive damages to the violator in the event suit is successfully maintained against him. Therefore, unless there is compelling public need for the proposed amendment, of which we are presently unaware, we do not favor its enactment.[11]

10. Hearings on H. R. 4597 above, May 26, 1953, page 59. We are informed this attitude foreshadows an early report adverse to mandatory treble damages by the Attorney General's National Committee To Study the Antitrust Laws—a committee which includes in its membership most of the witnesses who testified against mandatory treble damages at the above hearings.

11. *Idem.* page 58.

Aid Needed To Achieve Long-Range Plans

■ The American Bar Foundation's nationwide fund-raising campaign which teamed 329 lawyer-directors for the states and territories (and an unknown, but doubtlessly impressive, number of workers at the local level) has gone through a significant transition.

The "bricks and mortar" have been provided for the American Bar Center. The Association's new home and national research center today is in operation. Paying for that operation, and building a reserve for the future, might be called *development*. And that's where transition has brought us.

Victory for the capital building fund campaign came, of course, on August 16 when the late George Maurice Morris, of Washington, D. C., stood before the opening session of the House of Delegates, convened for the American Bar Association's annual meeting, and announced: "We're up. We're over. We're in." His words brought the House to its feet in acclamation of a spectacular $1,500,000 achievement.

Today, the fund stands at better than $1,575,000—105 per cent of the national quota.

When the outgoing Finance Committee of the Foundation held a series of meetings at the time of the dedication of the American Bar Center, it was not for purposes of mutual congratulation. Amid expressions of gratitude to the twenty-two states and one territory that had completed their fund-raising assignments, there hung this question: What yet can be expected of jurisdictions that thus far have fallen short of their quotas? Quotas are arbitrary things. They also are stubborn facts. Apportionment of quotas among the states gave the campaign a common denominator. The twenty-three that excelled brought in a total surplus over their combined quotas of approximately $225,000—more than enough to provide the margin for victory. Nevertheless, it was the Committee's position that quota achievement as an end in itself was desirable.

Nine states, it was noted, hovered close to their dollar goals. If they and the other state organizations below quota were offered an extension of time, perhaps they would become winners, too. Consequently, the Committee urged that closing of the campaign be delayed, until the mid-year meeting in February, for the fund-raising organizations as now constituted.

Meanwhile, long-range plans for development are evolving under the stewardship of the "new" Finance Committee appointed by President Loyd Wright. Comprised of men of outstanding legal stature and brilliant "firing-line" experience in fund-raising, the Committee includes Roy A. Bronson, of San Francisco; E. Smythe Gambrell, of Atlanta; James L. Shepherd, Jr., of Houston; Harold J. Gallagher, of New York; Telford B. Orbison, of New Albany, Indiana; and George E. Brand, of Detroit.

The emphasis now, of course, lies on development of the American Bar Center's basic research activity. To finance this, the Foundation continues to be "hungry".

Meanwhile, the current tax year is drawing to a close with several thousand Association members unlisted on the Committee's roll of contributors. In the Association's own membership remains a potential of support for state campaign organizations short of quota. And where we have overlooked natural friends of the profession—non-Association members, elements in the business community, families of departed lawyers whose memories should be perpetuated, organizations interested in the immense good that will stem from our national research center—each of these sources must "be asked" before the job of financing the American Bar Center can be truly said to be completed.

These, then, are the jurisdictions to which the American Bar Foundation continues to look for aid in the transitional phase of development finance (shown with original quota in parentheses): Alabama ($16,485), California ($110,803), District of Columbia ($45,840), Iowa ($25,290), Louisiana ($23,205), Maryland ($21,459), Mississippi ($6,848), Rhode Island ($8,085), Utah ($6,975).

Also, Missouri ($40,365), Tennessee ($24,960), Pennsylvania ($89,745), Washington ($26,910), Philippine Islands ($660), Massachusetts ($48,030), Kansas ($17,280), Oregon ($16,230), Alaska ($1,440), Florida ($31,215), Colorado ($15,810), Virginia ($25,230), Nebraska ($15,060), South Carolina ($11,325), Kentucky ($19,305), Connecticut ($24,660), Nevada ($4,230), Maine ($6,945), New Jersey ($52,275), Puerto Rico ($3,390), and North Carolina ($22,905).

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EDITORIAL OFFICES

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■ *Religio Juridici*

There went out a decree from Caesar Augustus that all the world should be taxed. Perhaps much of the money collected found its way to Rome as tribute. Perhaps much of it lined the pockets of publicans to whom the right of collection had been farmed out. Nevertheless where the Roman tax was levied the Roman peace descended. There is a tradition that, soon after the decree went out, the doors of the Temple of Janus, for the first time in recorded history, closed because nowhere in the world was war being waged.

Caesar's universal peace was short lived and God's universal good will has never come into being, but mankind still strives for them. We lawyers have a noble part in that task even though we do not profess to work for the spread of the golden rule. That has been left for another great profession. Our part is the humbler but more essential one of seeing that men render unto Caesar that which is Caesar's. Until a man will do his duty to society there is little hope that he will go the extra mile and love his neighbor as himself.

At this season, as men, we find enkindled in our hearts the hope that all mankind will learn to go the extra mile but, as lawyers, we know that mankind must first do justice and that it is our duty to see that justice is done. We need not pretend that we rank with the inspired religious leaders. The gift that is theirs has not been vouchsafed us. Our mundane goal is far below their high spiritual aim. We may rightfully glory, though, in the place that we do have in the scheme of things. Even those of us who do no more than see that Caesar's taxes are levied and collected without respect of persons are taking our modest part in man's glorious quest of justice that reached its first great attainment in the Roman law. That law both in content and enforcement was in many ways imperfect under our standards, but it was order, and order imposed by law and not by the capricious will of a tyrant.

When Caracalla asked the great judge Papinian to address the Senate in defense of Caracalla's murder of his brother, Papinian replied "Parricide is not so easy to defend as to commit" and lost his life for it. That same Papinian for a time held sessions of his high court in York, England. Of those sessions a legal historian has said that it was rather as if the Judicial Committee of the Privy Council were to sit at Uganda. It was in that "Uganda" that the seed of Papinian's noble stand for the supremacy of law eventually flowered with Coke's defiant declaration to his sovereign that when a case came before him he would do what became him as a judge. That too is our heritage, and we may justly feel the thrill of fellowship with Coke at such times as when in some so-called petty criminal case the court on our motion suppresses evidence obtained by illegal search. Our work itself may be earthy, but its purpose is closely akin to the divine. Inspired by that conviction we can take joy in what we have done and draw new strength to do still more in the struggle for justice and order between man and man.

Nineteen and a half centuries ago men were taught that they should govern themselves by brotherly love. Let it never be said that that ideal failed of reality because men could not even learn to govern themselves by law.

THE DEVELOPMENT OF INTERNATIONAL LAW

Richard Young • Editor-in-Charge

The Assembly, the Tribunal and World Court

■ In 1953 the employment of a number of United Nations employees of American nationality, who had declined to answer questions before a federal grand jury and a congressional committee investigating communist activities and subversion, was terminated by the Secretary-General. Several of those dismissed appealed against this action to the U.N. Administrative Tribunal, alleging a breach of their employment contracts. In decisions handed down on September 1, 1953, the Tribunal found eleven of the claims well-founded, ordering compensation in seven cases and reinstatement in four. When the Secretary-General subsequently declined to reinstate the four, as it was within his discretion to do, they also were awarded compensation.

The awards ordered by the Tribunal in the eleven cases came to a total of $179,420. At the session of the U.N. General Assembly in the fall of 1953, an item covering this sum was included in the supplementary financial estimates submitted by the Secretary-General to the Assembly's Fifth (Administrative and Budgetary) Committee. This touched off an extensive debate on the propriety of such payments under the circumstances. Eventually the Assembly decided, by a vote of forty-one to six with fifteen abstentions, to seek an advisory opinion from the International Court of Justice on the legal issues involved. In the meantime the item of $179,420 was removed from the supplementary estimates.

The questions thus submitted to the Court, in accordance with Article 96 (1) of the Charter, were finally formulated as follows in the resolution adopted by the Assembly on December 9, 1953:

> (1) Having regard to the Statute of the United Nations Administrative Tribunal and to any other relevant instruments and to the relevant records, has the General Assembly the right on any grounds to refuse to give effect to an award of compensation made by that Tribunal in favour of a staff member of the United Nations whose contract of service has been terminated without his assent?
>
> (2) If the answer given by the Court to question (1) is in the affirmative, what are the principal grounds upon which the General Assembly could lawfully exercise such a right?

In conformity with the practice of the Court, an opportunity was afforded to all interested states and to the International Labor Organization to submit to it statements on the subject. Fourteen states and the ILO presented written statements. In addition, the Court heard oral statements in June, 1954, from representatives of the Secretary-General, the United States, France, Greece, Great Britain and the Netherlands.

The Court delivered its advisory opinion on July 13, 1954, with twelve judges sitting.[1] By a vote of nine to three, it held that the first question should be answered in the negative, and that the second question therefore did not fall to be considered. Judge Winiarski (Poland) delivered a separate concurring opinion. Judges Alvarez (Chile), Hackworth (U.S.A.), and Levi Carneiro (Brazil) dissented, each filing a separate statement of his views.

In the majority opinion, it was noted that the Administrative Tribunal had been established in 1949 by action of the General Assembly. Its statute provided that none of its members could be dismissed by the Assembly unless the other members unanimously agreed on his unsuitability for further service. To it competence was given

> to hear and pass judgment upon applications alleging non-observance of contracts of employment of staff members of the Secretariat of the United Nations or of the terms of appointment of such staff members,

and its judgments were declared to be final and without appeal.

In the light of such provisions, the Court concluded that the Tribunal was a judicial body, not merely an advisory panel. As such, in accordance with "a well-established and generally recognized principle of law", its judgments were *res judicata* and had binding force on the parties thereto. The parties in matters before the Tribunal were the staff member concerned on the one hand, and the United Nations Organization, represented by the Secretary-General, on the other. A final judgment by the Tribunal, adverse to the contentions of the Secretary-General, therefore created a legal obligation binding on the organization, by which the General Assembly, as an organ of the organization, must also be bound.

The Court's opinion readily admitted that the Assembly, in framing the Statute of the Tribunal, might have established some form of control or review over the Tribunal's decisions; indeed, by amendment of the Statute it might still do so with respect to any future proceedings. The Assembly, however, had deliberately chosen to make the Tribunal's awards final, and so they must be held. The Court's opinion would seem to imply that this would be the case even if the Tribunal acted with obvious impropriety or *ultra vires*, although there was no suggestion from any source that such had been the situation in fact. The Court also observed, by way of *caveat*, that if the Assembly should contemplate some provision in the future for the review of the Tribunal's awards by some other organ, the Assembly itself could hardly discharge such a judicial function in view of its composition and other functions.

Having dealt thus with the affirmative reasoning leading to its conclusion, the Court went on to consider

1. *I.C.J. Reports* (1954) page 47.

whether this was affected by any of the various contentions advanced in favor of the Assembly's power to refuse to give effect to awards of the Tribunal. It found little difficulty in disposing of doubts cast upon the organization's power to create an administrative tribunal or upon the Assembly as the appropriate organ to exercise the power. Nor was it impressed by the argument that the Assembly's financial powers to consider and approve the budget could not be restricted by requirements to pay compensation imposed by another body, U.N. expenditures, the Court pointed out, included many items for obligations already incurred, and insofar as these obligations were legally binding on the organization (as the Tribunal's awards had been found to be), the Assembly "has no alternative but to honour these engagements".

The most substantial, perhaps, of the opposing arguments—and one stressed by Judge Hackworth in his dissenting opinion—was that the Tribunal was a subsidiary or subordinate organ, and that its judgments therefore could not bind the superior organ which had created it. The question has some analogy to the perennial riddle of the power of a sovereign to bind himself; Judge Alvarez, indeed, in his dissent characterized the Assembly as having "supreme power" and as "sovereign". The majority, however, took a different view:

> It has been argued that an authority exercising a power to make regulations is inherently incapable of creating a subordinate body competent to make decisions binding its creator. There can be no doubt that the Administrative Tribunal is subordinate in the sense that the General Assembly can abolish the Tribunal by repealing the Statute, that it can amend the Statute and provide for review of the future decisions of the Tribunal and that it can amend the Staff Regulations and make new ones. There is no lack of power to deal effectively with any problem that may arise. But the contention that the General Assembly is inherently incapable of creating a tribunal competent to make decisions binding on itself cannot be accepted. It cannot be justified by analogy to national laws, for it is common practice in national legislatures to create courts with the capacity to render decisions legally binding on the legislatures which brought them into being.
>
> The question cannot be determined on the basis of the description of the relationship between the General Assembly and the Tribunal, that is, by considering whether the Tribunal is to be regarded as a subsidiary, a subordinate, or a secondary organ, or on the basis of the fact that it was established by the General Assembly. It depends on the intention of the General Assembly in establishing the Tribunal, and on the nature of the functions conferred upon it by its Statute. An examination of the language of the Statute of the Administrative Tribunal has shown that the General Assembly intended to establish a judicial body; moreover, it had the legal capacity under the Charter to do so.

The Court's answer to the question posed is clear. But at the time of writing it remains to be seen what position the Assembly will take on the matter, in the light of this opinion, at its session this fall.

The Legal System of Israel:

by Daniel Jacobson • of the Israeli Bar

■ **The creation of a new nation necessarily implies the creation of a new legal system. The infant State of Israel was faced with the problem of composing the judicial and legal differences of a people separated and scattered for nearly two thousand years. Mr. Jacobson's article is an account of how the basic law of Israel is being built.**

Daniel Jacobson

■ The Government Organization and Law Ordinance of 1948 was enacted by the Provisional State Council on May 21, 1948. This was the first act of legislation passed by the Provisional State Council which was empowered to legislate for Israel by virtue of the Proclamation dated May 14, 1948, regarding the establishment of the State of Israel.

The above ordinance is often referred to as the "small constitution". Section 11 thereof provides that the law of Palestine in force on May 14, 1948, should continue in force insofar as it is not repugnant to the ordinance or future laws promulgated in Israel, and subject to the changes resulting from the establishment of the new state.

This is no doubt a typical case of state succession, and we must now turn to find out what was the law of Palestine which was adopted by the new state upon its recent establishment.

The Constitution of Palestine is embodied in the Palestine Order-in-Council of 1922. The Order-in-Council was made by His Britannic Majesty according to English law after the Allied Powers had selected Britain as the mandatory for Palestine. The Order-in-Council was made at the Court at Buckingham Palace on August 10, 1922, and was subsequently amended several times, the last amendment being made in 1947.

Part V of the Order-in-Council is headed "Judiciary", and the marginal note to Article 46 reads: "Law to be applied". This latter article is the cornerstone of the law of Palestine, and no doubt it ought to be quoted here *in extenso*. It reads as follows:

> 46. The jurisdiction of the Civil Courts shall be exercised in conformity with the Ottoman Law in force in Palestine on 1st November, 1914, and such later Ottoman Laws as have been or may be declared to be in force by Public Notice, and such Orders in Council, Ordinances and Regulations as are in force in Palestine at the date of the commencement of this Order, or may hereafter be applied or enacted; and subject thereto, and so far as the same shall not extend or apply, shall be exercised in conformity with the substance of the common law, and the doctrines of equity in force in England, and with the powers vested in and according to the procedure and practice observed by or before Courts of Justice and Justices of the Peace in England, according to their respective jurisdictions and authorities at that date, save in so far as the said powers, procedure and practice may have been or may hereafter be modified, amended or replaced by any other provisions.
>
> Provided always that the said common law and doctrines of equity shall be in force in Palestine so far only as the circumstances of Palestine and its inhabitants and the limits of His Majesty's jurisdiction permit and subject to such qualification as local circumstances render necessary.

It should be noted that Article 46 has in no way been altered or amended. Reading this article one immediately sees that the law of Palestine is composed of Ottoman

and English law. Furthermore, Ottoman law was first based on Islamic principles; later, however, Ottoman commercial laws, which were enacted in the second half of the nineteenth century, followed French law. There was thus a variety of laws applicable, which sometimes caused confusion, especially in connection with the phrase "and so far as the same shall not extend or apply", which appears in Article 46.

An interesting and most important point which thus results from Article 46 is that there can never be any lacuna in the law of Palestine; for English common law is deemed to provide for and cover all cases and situations. As it was said in the judgment of the Privy Council in an appeal from the Supreme Court of Palestine (P.C.A. 1/35, 2 P.L.R. 390, 394), "their Lordships think there can be no doubt that the provisions of the Order in Council do enrich the jurisdiction of the Courts in Palestine with all the forms and procedure and all the different remedies that are granted in England in common law and equity".

During the duration of the mandate many ordinances were enacted, and the bulk of Ottoman laws ceased to have effect in Palestine. However, the Mejelle (the Ottoman Civil Code), the Ottoman land laws and some articles of the Ottoman Law of Procedure and Commercial Code are still in force in Israel today. The Palestine ordinances, one should observe, are modeled upon and follow English common law, equity and statutes.

As regards the civil courts, to which alone Article 46 refers, one should add that when the amount or value in dispute exceeded five hundred pounds an appeal lay from the Supreme Court of Palestine to the Privy Council. Such appeals have, of course, been abolished upon the establishment of the State of Israel.

In addition to the civil courts, the Palestine Order-in-Council also recognizes the Moslem religious courts, the Rabbinical courts of the Jewish community and the courts of the several Christian communities respectively. All these courts have jurisdiction in matters of personal status and in matters of religious endowments. Each of such courts has jurisdiction over members of its community; in some matters exclusive jurisdiction, and in other matters jurisdiction only where all parties give their consent thereto. The various religious courts adopt and follow their respective laws.

Conflicts of laws and of jurisdictions are, consequently, not infrequent. In parenthesis, I would add that the judges and advocates of this country have received their legal training in many lands and under different systems. One can thus easily understand that there are various approaches to legal principles in Israel. One may, perhaps, say that the law is in a melting pot willing to accept the best principles of the different legal systems. In this way, almost unintentionally, the science of comparative law is being gradually developed.

To illustrate the last point with reference to American law, I would refer to two recent cases in the Supreme Court of Israel. In Criminal Appeal 112/50, the Court had to interpret the term "discrimination". In the judgment reference was made to Volume 14 of the *Encyclopedia of the Social Sciences* (New York, 1948), and also to two American cases: *Quaker City Cab Co.* v. *Commonwealth of Pennsylvania;* 48 S. Ct. 553, 556; *Lindsley* v. *National Carbonic Gas Co.,* 31 S. Ct. 338 (1911.)

In High Court 177/50 the main point to be determined was the effect of a pardon. From the United States Constitution the court quoted the power vested in the President (to grant reprieves and pardons for offenses against the United States), and the court also quoted from the judgments of Chief Justice Taft in *Ex parte Grossman,* 45 S. Ct. 332 (1925), and of Justice Field in *Ex parte Garland* (1867).

In Volume 5 of the Israel Supreme Court Reports (Psakim) one can find nine judgments of courts in the United States referred to as persuasive authorities and relied upon by the judges of Israel.

Special reference should be made to the revival of the great and old Hebrew laws and authorities. The Talmud and the various commentaries and interpretations of many learned Jewish authors provide a vast source of law covering a large field. With the revival of the Hebrew language many of these old books are brought back to daily life, and one is amazed at the practical approach to various problems, and the wisdom, acumen and understanding of our forefathers centuries ago.

In 1952 the Ministry of Justice and the Harvard Law School established a program of research in order to aid the Government of Israel in its great task of drafting modern legislation on various subjects. I worked on this project at Harvard during the academic year 1952-1953, and it is hoped that this interesting cooperation has already served a useful purpose.

The Ministry of Justice has appointed also several committees whose task it is to study various branches of law and recommend reforms or codifications where necessary. These committees are now at work and it is still too early to say what the result of their efforts will be.

However, one can say with reasonable certainty that the new Israel laws follow Anglo-American law. This is clearly proved if one examines the two new major bills: The Succession Bill and the Evidence Bill.

The law of the State of Israel has probably not yet been finally moulded. There is as yet no real constitution, and it is unlikely that a constitution will shortly be adopted. But one can boast that the law is as reasonably certain as in England and the United States and the courts, imbued with the spirit of the law, adjudicate impartially between all litigants and constantly seek the path of righteousness.

The Lawyer and Capitalism:

Part II

by William J. Palmer • Judge of the Superior Court of Los Angeles County, California

■ In this issue, the *Journal* presents the second half of Judge Palmer's analysis of the struggle between the men of the free world and the overlords of Communism. The first part appeared in our November issue.

VII

A fifth fraud of communism is its promise to produce a classless society. It is extremely doubtful that anyone at the core of a communist movement or government believes in this promise or intends that it be fulfilled. But it makes a seductive delusion for the hate, envy, jealousy and vandalism that are the dominant emotions of the communist following.

No reason, of course, can be given why we should have a classless society. We would find it difficult to imagine anything more insipid or discouraging or more deteriorating to the human species. We might as well advocate a classless school, wherein all of us would remain in the kindergarten. Or, from cognate folly, we might propose classless trees, vegetation and animals, or assembly-line humans with no change in models.

Nature herself, abhorring monotony and sameness, is the great classifier. Although she has created by a process of evolution, two amazing facts about her creation are its infinite variety and its numerous sharp definitions. She has made human beings as different as they can be and still have enough in common to be identifiable as members of the species.

A classless society is an impossibility. But in a wise, cultured and kindly civilization, every class into which people naturally group themselves by their common interests and skills, their kindred education, comparable means, intelligence, culture or success, will have two doors, one for entrance and one for exit, neither of which will be controlled by heredity or autocracy. Thus the existence of every class tells us all that we, too, might belong to it if we wish and try, if we fittingly equip ourselves, or if the "breaks" come our way as they may. And thus it is that under the competitive and open capitalism of the United States, no caste exists, and no class exists except the natural, fluid groupings of people, and none exists with a closed door.

Compare this with the rigid, despotically controlled class system of Russia. (Of interest: "I Escaped to Speak for the Enslaved" by Dr. Marek S. Korowiez, *Life*, March 1 and 8, 1954.) Her people are divided broadly into four classes, and no one moves from one to the other except by the will of the masters. At the bottom are the abject slaves. Next above them is a class composed of the greater part of the population and who fittingly might be called the ordinary or the beguiled slaves. Not all of them are beguiled, to be sure, but the intention of the rulers is that they shall be. Give the rulers a few more generations in which to pursue their program of maleducation, and their intention could be realized. Members of this class are allowed bits of freedom in areas involving no risk to the ruling caste and no loss of thought control. The next higher class may be called appropriately the preferred slaves. They are selected persons whose knowledge, talents, skills or unquestioning loyalties are deemed necessary or of special value to the oligarchy. This class includes scientists, engineers, entertainers, artists of various kinds, athletes in state training to display the Russian prowess, teachers, minor government agents, and others of exceptional usefulness. Within this class itself exists a rigid hierarchy, and referring to it as one class is justified only by relativity and comparison. Members of this caste are allowed a good deal of freedom, paid much better than the beguiled slaves, and given other privileges. An indoctrinated member of the class might believe that he was

not a slave, but he would be abruptly disillusioned if he expressed a nonconforming idea. The top, most favored, and most highly paid class in the sharply defined communist hierarchy is composed, of course, of the rulers, their courtiers and entourage.

It is true that when taking over a country and appropriating to themselves all the property of all the people, the communist conspirators liquidate the previously existing *bourgeoisie,* always anathematized in communist ideology and propaganda. The captors do destroy the previously existing "classes". But forthwith the old classes are replaced by new ones, more arbitrary, more autocratic, more ignorant, selfish, exclusive and cruel than the classes replaced.

VIII

A sixth fraud of communism is its promise to establish a dictatorship of the proletariat. This promise is alluring bait for simpletons; it never is fulfilled, nor could it be; but it helps the conspirators, in gaining control of a country's capital assets, to use mob psychology and the elemental ignorance, hysteria and cruelty of the mob.

No rationale ever has been or will be formulated for a dictatorship of the proletariat. It would be equally absurd to advocate a dictatorship of seamen over the navy, of privates over the army, of freshmen over the university, or of janitors and elevator operators over the department store. The term, itself, "dictatorship of the proletariat", is a self-contradiction. When there is more than one dictator, either the dictators must agree or one or more dictators disappear. In his book, *What Happens to Communists?*, Michael Padev points out that since 1917, the following Russian Soviet high officials have been shot as spies or traitors:

"Nine of 11 Cabinet ministers holding office in 1936.

"Five out of seven presidents of the last Central Executive Committee.

"Forty-three of the 53 secretaries of the Communist Party Central Organization.

"Fifteen of 27 top Communists who drafted the 1936 constitution.

"Seventy out of the 80 members of the Soviet War Council.

"Three of every five marshals of the Soviet Army.

"All members of Lenin's first post-revolution Politburo, his inner cabinet of 1917—except Joseph Stalin."

Under communist ideology all citizens of a country, after the necessary liquidation of nonconformists has been accomplished, belong to the proletariat. If they were to be dictators over themselves, how would they learn what dictates they might agree on except by a full, free and secret ballot? And if they disagreed, how would they reconcile their disagreements except by the principle of majority rule? If they really pursued these methods, they would have a democracy, not a dictatorship. But such methods, of course, are not pursued.

IX

Communists and those who would prepare the way for them in this country have been badgering the word "profits" for decades until today, if the word bears a connotation of evil to naïve minds, including some among the clergy, college students and faculty, we ought to be sympathetic and to venture not criticism but earnest enlightenment. In their efforts to innoculate this sinister connotation, communist conspirators have practiced a seventh fraud upon the human mind.

If you invest all your savings and borrowed capital, too, in a business venture, work sixteen hours a day to launch your project and carry it over the rugged pioneering hill, shoulder with your family all the burden and nervous strain of your risk and its uncertainty, finally reach a year when your income is greater than your expense, grow so you can provide employment for others and pay them good wages, you will have become, in communist ideology, an exploiter of your fellow men, your employees, and they will be "wage slaves". This will be so because your business will have made profits (your compensation for your risk, worry, ability, imagination, labor, creation of jobs for others, and all your service to society).

People whose compensation is called "profits" are people, too. The only basic and essential difference between profits of the business founder and wages of his employees is that the latter involve no risk of capital and are much more certain. If the profits prove to be the greater, that fact is an incident of the greater hazard and all that it has involved.

But everyone who spends less in consumable goods and services than he receives in wages, salary, commissions, royalties or by other compensation, is making a profit. From that profit he acquires all his capital assets. The wage-earner's television set, electric refrigerator and automobile are profits.

In the United States thousands of persons receive "wages" which are envied by thousands of business owners, who receive only their profits when any are made. If one man's profits seem too high, so do another man's wages. These are relative matters, and under competitive and open capitalism—if it is really kept competitive and open at all levels—a tendency toward reasonable balance and relationship always is at work.

Every valuable thing that civilization has acquired is profit. Let us note just one example of the part profits play in the everyday life of us all: We must have food; let us use wheat for an example. How and why will anyone produce wheat for us? He must have at least land, seed and machinery. These either have been or can be acquired only from profits, someone's profits. If not from this particular grower's past profits, then he will anticipate his future profits and borrow against them to acquire the essentials for production. And if the grower of wheat does not make a profit, even if it were possible for him to go on producing wheat for us, why should he? Why should he work without compensation, which, in his case, is called profit?

In 1953 the meat-packing industry of our country gained a net income of seven-tenths of one cent on each dollar of sales. For each five dollars in sales, it kept three and one-half cents! In the same year, the chain food stores, providing a marvel of service, gained a net income of one-tenth cent on each dollar of sales. Not the faintest probability exists that these vital services ever will be performed so well or so cheaply in a society whose economic processes have been seized by a political-police monopoly.

In this matter of profits, we have the pivotal difference between competitive and open capitalism, on the one hand, and monopolistic capitalism, whether called socialism or communism, on the other. The purpose and method of open and competitive capitalism are to use profits, whether so-called, or called wages, salary, annuities, royalties, rents, dividends, retirement payments or by other name to make the greatest possible number of people independent of the state and independent of the charity of others. With human nature as it is, the results will fall short of perfection, but they, nevertheless, will be comparatively successful and remarkable. Having achieved them, competitive and open capitalism then provides the profits, or even capital assets, if necessary, to care for those who have not reached such independence, or who, once having gained it, have lost it.

The purpose and method of communism are to deprive everyone of profits and thus make everyone wholly dependent upon the state—or, rather, on the few who rule and who call themselves the state.

Because profits are the lifeblood of any system of free economy, those who would prepare the way in this country for a communistic monopoly never miss a chance to asperse or belittle the genius behind all our profits, the American business builder and executive, or to destroy or reduce his profits. You will find them lending their support to every proposal and project (sometimes as the originating schemers) that either harasses, or promises opportunity for the harassment of, or depreciates that businessman.

The Machiavellian minds behind this preparing of the way appreciate more fully than many legislators and political executives the significance of the following facts: In a free economy, people obtain gainful employment through three channels: (1) self-employment, (2) private institutions owned by others, and (3) government. Obviously, the greater the employment in channels 1 and 2, the lighter the burden on government. It would seem to be apparent to most adult minds that a wise government would do everything within its power to encourage employment in channels 1 and 2, and would adopt no measure or policy without first putting it to the test: What will the effect of this be on employment opportunities in private enterprise? Only profits make such employment possible.

Cycles of higher and lower activity and their accompanying psychological cycles are not only inevitable in any sound economy but, within limits, are beneficial. It is during periods of reduced activity that the best thinking, house cleaning, planning, and self-disciplining are done in the economic structure. Such periods are pruning times; roots are strengthened and driven into new soil; and, following every recession and depression, the economic organism of a free society burgeons with renewed vigor and variety. But you will observe that the first and only thing some persons and groups want us to think about when a business cycle enters the downward trend is not how to encourage, support and strengthen channels 1 and 2, but how to throw the government into large-scale employing business.

The government is not a producer of wealth and has no money to pay workers, except only what it collects from the producers. Government is merely the transfer agent; it may create the jobs, but to pay the wages it takes the money from the privately owned economic structure. In so doing, especially if intemperate, it can start a vicious cycle. If the self-employed and the private employer of channels 1 and 2 already are harassed, the taking of their funds to pay for government jobs, the creation of government competition with capital drawn from them, and the imposition of other burdens, can reduce both their capacity and their spirit to provide employment. (This possibility is not fanciful. I am only one person, but I have known several instances of business closing down or refusing to expand because of the discouraging policies or practices of, or the atmosphere created or the interferences or obstructions allowed by, government.) As such effects multiply and deteriorate the economy, those who know no method of solving any problem except more law, more government and more taxes, would throw the government further into the business of directly providing employment. In this way, as communists know, totalitarianism can come to America, not by choice of the people, but by our innocence, the self-seeking of candidates for, and holders of, public office, and by our being victims of the craftiness, hypocrisy and deception of the communist conspirators.

It should be made known to every American citizen who wants to be free that the *sine qua non* of his freedom is profits.

X

Communists have a pretty slogan which, no doubt, is enticing to many idealistic persons: "From each according to his ability, and to each according to his need." By this slogan, they practice an eighth fraud upon the credulous.

It should be clear that only God could fulfill such a promise, for aside from the necessary mechanics of the project, only He could search the minds and spirits of men, know the capacities of their minds and bodies, and thus be able to determine their abilities and needs. Henry David Thoreau proved that man really needs very little in the way of material goods and services. Perhaps that fact is what the communists

have in mind. Their results would so indicate. However, Thoreau and all the philosophers and ascetics who have proved the same point have had intangible, spiritual resources, which communism not only does not provide, but denies. Its materialism and atheism are throwbacks, placing it thousands of years in the rear of the forefront of evolution. Its doctrine that man is a mere creature of his material environment and is molded in the image thereof has been proved false innumerable times. Mere physical environment, from that of poverty to that of luxury, has a sorry record in the matter of establishing dominance over the human spirit. It is when we consider the intangible factors in that environment—religious faith, prayer, intelligence, love, understanding, trust, patience, the art of teaching, integrity, character and ambition—or the absence of such factors, that environment challenges heredity for supremacy in influencing and molding the human mind and character. And when those spiritual factors in environment are combined with the same factors in heredity, the results can be prodigious. Let us note one example:

David Dudley Field (1781-1867), a graduate of Yale, was a Congregational minister. He held two pastorates in a life of long usefulness, one at Haddam, Connecticut, the other at Stockbridge, Massachusetts. His wife shared his faith, wisdom and principles. Their restricted material circumstances were typically those of the clergy of their time and of most clergymen today. Their children were: (1) David Dudley Field, active member of the New York Bar for over fifty years, known as "The Father of American Legal Reform", pioneer and persistent advocate of codification, of whom Austin Abbott said: "For at least a third of a century, David Dudley Field was the most commanding figure at the American Bar." (2) Matthew Field, engineer, who built the longest suspension bridge of or before his time. (3) Jonathan Field, lawyer, highly respected leader of the Bar in Massachusetts, who revised the statutes of that state. (4) Stephen J. Field, an early Chief Justice of the Supreme Court of California, and a Justice of the Supreme Court of the United States for thirty-four years and six months, serving longer on that court than any other Justice. (5) Cyrus W. Field, financier, railroad developer, one of the original projectors of the elevated railroad system of New York City, and the man who projected, promoted, and achieved the laying of the first Atlantic cable. (6) Henry Martin Field, a distinguished clergyman, editor and author. (7) Mary, who died when but a young woman, and (8) Emelia Ann, who married a missionary and mothered a son who became a Justice of the Supreme Court of the United States, David J. Brewer.

Manifestly the very tenets of communism prevent it from knowing or providing what each individual needs. But even if we confine the meaning of the slogan to physical goods and tangible services, we are confronted by the necessary implication and the fact that the few turgid capitalists who rule the communist state set the measure of everyone's needs. By the ideology of these overlords, the individual has no needs not subordinate to those of their golden calf, the state.

On the other side of the equation, the side that reads "from each according to his ability", the communist tenets and methods again make performance impossible. Society never can receive from each according to his ability when minds and thoughts and bodies are controlled by the force and oppression of dictatorship. As previously pointed out, the individual can find his ability and develop it only in freedom, in the self-choice of interests, opportunities, truthful information and learning, and in the motivations and enthusiasms born of freedom.

Napoleon, in reflection wrote: "Do you know what amazes me more than anything else? The impotence of *force* to organize anything. There are only two powers in the world—the spirit and the sword. In the long run the sword will always be conquered by the spirit."

Real human beings, men and women not cowed by masters, want more from life than their physical needs. A social, political and economic scheme that promises no more does not promise much. Above all, they want the gratifications that come from independent, self-directed achievement and from the service of others through that achievement. No gratification comes from being compelled by tyrants to serve. The aspiring musician does not practice eight or more hours a day for years just for his physical needs. Neither for such a bare recompense does the medical student pursue the long grind of preparation for a great and necessary service to society. Open and competitive capitalism, rather than any other scheme of political economy, has provided the most widespread opportunities for, and has created the least interference with, the gaining of the finest satisfactions in human life. Under its freedom and its generous support of religious institutions, even if one wishes to be an ascetic or to seek Nirvana, he may do so.

All enlightened persons, all reasonable persons, wish for the welfare of all peoples. They wish also that human society may be impregnated with the spirit of kindness. They do much to promote those ends. But they know that the weak, if they are to be helped, must be helped by the strong and that to destroy or prevent strength in individuals is to promote weakness generally. They know that no human society can be stronger, more resourceful, intelligent, courageous or better informed than the individuals who compose it. And they know that unless founded on these truths, no so-called welfare state can long be a welfare state.

Before me is a clipping from a dependable newspaper. It carries a factual story about the work of a charitable agency set up to help refugees from behind the Iron Curtain learn about and adjust themselves to our kind of civilization.

(Continued on page 1103)

The Investigating Power of Congress:

Its Scope and Limitations

by Henry J. Merry • of Cambridge, Massachusetts

■ Unhappily there was a misunderstanding on the part of Miss Miriam Lashley under which she entered the Ross Essay Contest and was awarded the 1954 prize.

The rules and regulations under which each contestant participated state, in part:

> An essay shall be restricted to 5,000 words, including quoted matter and citations in the text. Footnotes or notes following the essay will not be included in the computation of the number of words, but excessive documentation in notes may be penalized by the judges of the contest. . . . Total number of words on each page of the text shall be typed on bottom of the page of at least one copy.

After the award of the contest prize to Miss Lashley, it was discovered that she did not compute, by exact count, the number of words in her essay. She was at one time the editor of a law journal, and followed the practice she had established as an editor, of estimating the number of words on each page.

This estimate unfortunately proved to be substantially less than the actual number of words in the essay. The total wordage of her essay was well in excess of the 5,000 limitation clearly imposed in the contest rules. It has therefore been necessary to find Miss Lashley's essay ineligible to qualify for the award.

This is a most regrettable situation, involving circumstances which can be readily understood but which are nonetheless embarrassing to all concerned. Steps to guard against a recurrence of the incident in the future will, of course, be taken.

The new winner of the 1954 Ross Essay award, on the basis of his essay on the subject, is Henry J. Merry, of Cambridge, Massachusetts.

Mr. Merry was born in Pontiac, Michigan, in 1908. He was admitted to the Bar in Michigan in 1936 and has also been admitted to the Bars of the District of Columbia and the States of New York and Illinois. Elected to membership in the American Bar Association in 1945, Mr. Merry is presently a member of the Section of International and Comparative Law.

■ At a time when the methods of a few congressional committees have become the center of political controversy, a study of the investigating power of Congress is apt to be unduly influenced by circumstances of a temporary or special nature. The prevailing situation cannot be disregarded, however. It may perhaps be brought into proper perspective by an approach which considers historical developments and the more recurring kind of problem as well as those featured in the current debate.

The most fundamental type of conflict probably is that which arises from the two ideas placed in juxtaposition by the Supreme Court in the *Daugherty* opinion[1] during 1927. It stated that a "legislative body cannot legislate wisely or effectively in the absence of information" and at the same time pointed out that "some means of compulsion are essential to obtain what is needed" because information volunteered "is not always accurate or complete" and "mere requests . . . often are unavailing". In that case, a brother of a former Attorney General had been arrested by a Sergeant-at-Arms of the Senate for failure to answer the summons of a committee investigating the Department of Justice. A federal district court released him on a writ of *habeas corpus*,[2] but the Supreme Court held that the committee was entitled to his testimony. Such incidents as that demonstrate the two sides of what the Court in 1950 succinctly called "the great power of testimonial compulsion".[3] On the

1. *McGrain v. Daugherty*, 273 U.S. 135 at 175, 47 Sup. Ct. 319, 71 L. ed. 580 (1927). The Court found that while the "power to make investigations" is not granted expressly, it is "so far incidental to the legislative function as to be implied". "It was so regarded in the British Parliament and in the Colonial legislatures before the American Revolution; and a like view has prevailed and been carried into effect in both Houses of Congress and in most of the state legislatures." *Id.* at 161. See also, Landis, "Constitutional Limitations on the Congressional Power of Investigation, 40 *Har. L. Rev.* 153 (1926).

2. *Ex Parte Daugherty*, 299 Fed. 620 (S.D. Ohio, 1924).

3. *United States v. Bryan*, 339 U.S. 323 at 331, 70 Sup. Ct. 724, 94 L. ed. 884 (1950).

one side is the traditional principle that the public has a "right to every man's evidence"[4] and on the other, is the unpleasant fact that coercion may be necessary because the individual concerned believes that his private affairs are being improperly invaded.

In all probability this source of conflict is too much at the heart of legislative inquiry ever to be eliminated in its entirety. Its intensity may be reduced, no doubt, and achieving this involves various choices between legal and political standards and between judicial and congressional responsibilities. These paths of reference may be helpful in analyzing the problem and the general tendency is to associate progress with the adoption of customary legal and judicial processes. Congress by its own volition has moved in this direction in at least one respect. Reported cases after 1935 disclose no instance of detention by the Sergeant-at-Arms of the Senate or House, but rather the regular use of more familiar enforcement methods under a statutory procedure which includes grand jury indictment and trial by jury.[5]

The alternative methods of punishing recusant witnesses have coexisted since 1857 but many landmark cases involved the inherent and independent power of a house of Congress to punish for contempt. This power was first recognized by the Supreme Court in 1821.[6] A man named Anderson sued the Sergeant-at-Arms of the House of Representatives for assault and battery and false imprisonment. The officer admitted that he had "gently laid his hands" upon Anderson and detained him for nine days, but pleaded that there had been a breach of the dignity of the House, that the detention occurred while the matter was being considered and that upon conclusion Anderson was reprimanded by the Speaker, Henry Clay, and released. The purpose of the arrest had been to compel appearance, but the Court reasoned "that the power to institute a prosecution must be dependent upon the power to punish".[7] Without reference to any precedent, English or American, it based the authority to punish for contempt upon the necessity of the House to protect itself against "indignity and interruption". The specific nature of the act deemed by the House to have been contemptuous was treated by the Court as beyond its concern.[8] This would indicate that the use of the power was outside the scope of judicial review.

The investigating power of Congress was brought within the general control of the judiciary by the *Kilbourn* case[9] in 1880. Kilbourn was a partner in a real estate pool which became involved in governmental matters through the actions of others. The Secretary of the Navy had deposited United States funds with Jay Cooke and Company. It had become bankrupt and its affairs were pending before a federal court. One of its assets was an interest in the real estate pool, and reports that this was the subject of a proposed settlement detrimental to the Government led the House to start an investigation. Kilbourn refused to answer questions, was detained for forty-five days and brought suit for false imprisonment. The Court declared the inquiry "clearly judicial" and said that Congress had no general power to inquire into private affairs.[10] Most significant probably is the fact that the resolution instructing the committee "contains no hint of any intention of final action". The Court at one point stated that an avowed purpose of impeaching the Secretary of the Navy would have changed the whole aspect of the case and at another implied that an investigation is "fruitless" if it could not result in valid legislation on the subject.[11]

Anderson and *Kilbourn* represent opposing views on the responsibility of the judiciary. Subsequent cases weakened[12] but did not eliminate the principle that a legitimate objective for compelling testimony must be evident. These cases concerned largely the interpretation of the various statutes and resolutions by which Congress authorized committees and administrative agencies[13] to undertake investigations.

The cases concerning a legitimate object are marked by varying attitudes toward the term "legislative". Some opinions[14] indicate that the

4. 4 Wigmore, *Evidence*, §2192, page 648. (3d ed.) "This contribution is not to be regarded as a gratuity, or a courtesy, or an ill-requited favor. It is a duty, not to be grudged or evaded. Whoever is impelled to evade or to resent it should retire from the society of organized and civilized communities, and become a hermit." *Id.* at 650.

5. Stat. 155, 156 (1857); 12 Stat. 333 (1862); 23 Stat. 60 (1884); 52 Stat. 942 (1938), 2 U.S.C. §§191, 192, 193, 194 (1946). The incident preceding the 1857 enactment was the refusal of a *New York Times* reporter to disclose the source of information upon which he based accusations against a member of Congress, *Cong. Globe*, 34th Cong. 3d Sess. pages 403-4.

The enactment did not divest the houses of Congress of the inherent power to punish for contempt, *In re Chapman*, 166 U.S. 661 at 672, 17 Sup. Ct. 677, 41 L. ed. 1154, 1159 (1897). "The statute was enacted, not because the power of the Houses to punish for a past contempt was doubted, but because imprisonment limited to the duration of the session was not considered sufficiently drastic a punishment for contumacious witnesses." *Jurney* v. *MacCracken*, 294 U.S. 125 at 151, 55 Sup. Ct. 375, 79 L. ed. 802, 808 (1935). "The judicial proceedings are intended as an alternative method of vindicating the authority of Congress to compel the disclosure of facts which are needed in the fulfillment of the legislative function." *United States* v. *Bryan*, 339 U.S. 323 at 327, 70 Sup. Ct. 724, 94 L. ed. 884 (1950).

The existence of the two remedial procedures does not place a person in double jeopardy; the two are "*diverse intuito* and capable of standing together", *Re Chapman*, 166 U.S. 661 at 672, 17 Sup. Ct. 677, 41 L. ed. 1154 (1897).

The nature of the independent power to punish for contempt is considered in *Marshall* v. *Gordon*, 243 U.S. 521, 37 Sup. Ct. 448, 61 L. ed. 881 (1917) and *Jurney* v. *MacCracken*, 294 U.S. 125, 55 Sup. Ct. 375, 79 L. ed. 802 (1935). The latter decision held there was summary power to punish for "past contempt". It is the last reported case involving detention by the constabulary of the House or the Senate.

6. *Anderson* v. *Dunn*, 6 Wheat. 204 at 210 (U.S. 1821).

7. *Id.* at 225.

8. *Id* at 228, 234. The printed record does not disclose the nature of the act deemed to have been contemptuous but the argument for the plaintiff includes references to an "offer of a bribe" and "bribery", *Id.* at 215. See *Kilbourn* v. *Thompson*, 103 U.S. 168 at 196, 26 L. ed. (1880), where the inference of attempt to bribe is suggested as the offense by Anderson.

9. *Kilbourn* v. *Thompson*, 103 U.S. 168, 26 L. ed. 377 (1880).

10. *Id.* at 192, 190.

11. *Id.* at 194, 193, 195.

12. The Supreme Court recently referred to the "loose language of *Kilbourn* v. *Thompson*, . . . the weighty criticism to which it has been subjected, . . . the inroads that have been made upon that case by later cases, . . ." *United States* v. *Rumely*, 345 U.S. 41 at 46, 73 S. Ct. 543, 97 L. ed. 770 (1953).

13. "Information bearing upon activities which are within the range of congressional power may be sought not only by congressional investigation as an aid to appropriate legislation, but through the continuous supervision of an administrative body." *Electric Bond & Share Co.* v. *Securities and Exchange Commission*, 303 U.S. 419 at 437, 58 Sup. Ct. 678, 82 L. ed. 936 (1938). See also *Interstate Commerce Commission* v. *Brimson*, 154 U.S. 447, 474, 14 S. Ct. 1125, 38 L. ed. 1047 (1894).

14. *Kilbourn* v. *Thompson*, 103 U.S. 168 at 193, 195, 16 L. ed. 377 (1880); *McGrain* v. *Daugh-*

congressional function is exclusively legislative even though the Constitution grants the Houses a few judicial functions, such as judging the election of members and punishing their misbehavior.[15] Investigations seeking information on election campaigns are not uncommon[16] and inquiry into behavior is evident in the *Chapman* case[17] where a broker was questioned by a Senate committee authorized to inquire "whether any Senator has been, or is, speculating in what are known as sugar stocks during the consideration of the tariff bill now before the Senate". The Supreme Court declared, *inter alia*, that it "cannot assume on this record that the action of the Senate was without legitimate object, and so encroach upon the province of that body".[18]

A tendency to resolve doubts in favor of a legislative objective is evident in the *Daugherty* opinion.[19] It involved two Senate resolutions. The first did not express a purpose, but the Supreme Court said that the "only legitimate object the Senate could have in ordering the investigation was to aid in legislating" and concluded that "the subject-matter was such that the presumption should be indulged that this was the real object".[20] The second resolution stated that the information was sought for "legislative and other action". The Court declared that this is "of course open to criticism in that there is no other action in the matter which would be within the power of the Senate", but also stated that "it takes nothing from the lawful object avowed in the same resolution".[21] The Court was two years in deciding the *Daugherty* case and it is probably the leading authority on the power to investigate as a necessary auxiliary to the legislative function. Strong support came two years later in the *Sinclair*[22] case which, in contrast to *Kilbourn*, upheld an investigation of the validity of naval oil leases, although the matter was pending simultaneously in a federal court. The opinion included the comment that "the committee's authority to investigate extended to matters affecting the interest of the United States as owner as well as to those having relation to the legislative function".[23]

Does the authority of Congress properly include (1) the surveillance of the executive branch of the Government and (2) the process of informing the public? Some commentators on congressional functions have said as much,[24] and Woodrow Wilson, while a professor, wrote that the "vigilant oversight of administration" is as important as legislation and the informing function is even more important.[25] The Supreme Court, however, has not expressly recognized either as a distinct function nor has it invalidated any inquiry as being of that nature. Congress does carry on such activities, of course, and they might be called legislative because a relation to lawmaking is always conceivable. That would be only partially appropriate, however, and sweeping justifications are not conducive to the development of standards which tend to improve performance.

An "exposure" type of investigation was before the courts in the cases of two witnesses who had refused to supply information to the House Committee on Un-American Activities. A dissenting opinion in the Court of Appeals for the District of Columbia Circuit brings out that the Committee had a file of more than 1,000,000 names and that some of its chairmen had acknowledged that "exposure" was their primary objective.[26] The majority opinion, however, was concerned more with "potentiality"[27] than with past performance—the defendant had made an "omnibus" denial of the power to inquire into Communist Party associations. The Court stated that there was power to identify individuals but did not consider the possibility that an extensive search for wrongdoers might encroach upon the executive function. Paradoxically, the doctrine of the separation of powers may have restrained the Court from dealing with the question. The Court of Appeals for the Second Circuit brushed aside the exposure issue with the statement that "the authorizing statute contains the declaration of Congress that the information sought is for a legislative purpose and that fact is thus established for us."[28]

These decisions may make the question of extra-legislative functions immaterial. As long as Congress takes the precaution of expressing a legislative purpose and the courts are unwilling to go behind the declaration, there will be a legitimate objective to which the power of inquiry may attach.[29] Existence of power thus tends to merge with man-

erty, 279 U.S. 135 at 180, 47 Sup. Ct. 319, 71 L. ed. 580 (1927).

15. "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, . . ." "Each House may . . . punish its Members for disorderly behaviour . . . ." U.S. Const. Art. I, §5. There are also the separate powers of impeachment and trial, U.S. Const. Art. I, §2, §3.

16. *Reed* v. *County Commissioners*, 277 U.S. 376, 48 S. Ct. 531, 72 L. ed. 924 (1928); *Barry* v. *Cunningham*, 279 U.S. 597, 49 S. Ct. 452, 73 L. ed. 867 (1929) which describes the power as "not legislative but judicial in character". *Id.* at 613; *United States* v. *Norris*, 300 U.S. 564, 57 S. Ct. 531, 81 L. ed. 808 (1937). The latter case concerns a conviction for perjury.

17. *Re Chapman*, 166 U.S. 661 at 669, 17 S. Ct. 677, 41 L. ed. 1154 (1897).

18. *Id.* at 670.

19. *McGrain* v. *Daugherty*, 273 U.S. 135, 47 S. Ct. 319, 71 L. ed. 580 (1927).

20. *Id.* at 178.

21. *Id.* at 180.

22. *Sinclair* v. *United States*, 279 U.S. 263, 49 S. Ct. 268, 73 L. ed. 692 (1929).

23. *Id.* at 297.

24. "The second major function of a legislative body, where the people rule, is surveillance of administrative performance. . . ." Dimock and Dimock, *American Government in Action*, 336 (New York, 1937). "One of the most important functions of Congress is to inspect and review the performance by the executive branch of the government of its constitutional duties and its exercise of the powers delegated to it by the legislature." Galloway, *The Legislative Process in Congress*, 66 (New York, 153). "The third great function of Congress is the two-way task of representing the people in Washington and of informing the people back home about government problems." *Id.* at 198.

25. Wilson, *Congressional Government*, 297, 303, 311 (Boston, 1885).

26. *Barsky* v. *United States*, 167 F. 2d 241 at 255, fn. 18, and 256, fn. 19 (D.C. Cir., 1948); *cert. denied*, 334 U.S. 843, 68 S. Ct. 1511, 92 L. ed. 1767 (1948).

27. *Id.* at 245, 250.

28. *United States* v. *Josephson*, 165 F. 2d 82 at 89 (2d Cir. 1947), cert. denied, 333 U.S. 838, 68 S. Ct. 609, 92 L. ed. 1122 (1948).

29. Twenty years ago an outstanding writer on Congress stated: "The legislative branch can always aver that whatever it does is done for the purpose of making law. The courts may only hold that in a particular instance the averment is unreasonable. There can be no certainties." Luce, *Legislative Problems*, page 111 (Boston, 1935). This may have been better analysis than prophecy. The Supreme Court has never found an averment unreasonable.

ifestation of intent.[30] In fact, legislative purpose has been in important instances so sweeping a justification and so easy of proof that congressional objectives appear over-simplified and judicial review of the existence of power is largely a formal matter.

The scope of the power to investigate is linked in some respects to the existence of the power and in others to the method of enforcement. In *Anderson* the Supreme Court said that the extent of the inherent power to punish for contempt was *"the least possible power adequate to the end proposed"*,[31] but indicated no judicial responsibility in the matter. The *Kilbourn* decision took the first step and required a legitimate objective. In upholding investigating power on that basis in *Daugherty*[32] and *Sinclair*[33] the Court in each instance said that "a witness rightfully may refuse to answer where the bounds of the power are exceeded or the questions are not pertinent to the matter under inquiry".

The judicial review of "the bounds of the power" seems to have been no more than the finding of a proper purpose, and, as already described, this usually concerns "potentiality" rather than performance, either general or particular.

The judicial review of the pertinency of the questions brings to particular instances of performance, the idea that the use of the power is limited to the necessities which bring it into existence. Pertinency is also one of the requirements in the statute under which uncooperative witnesses may be punished. The existing enactment provides, in part, that any person "summoned as a witness . . . to give testimony or to produce papers upon any matter under inquiry" who "willfully makes default" or who having appeared, "refuses to answer any question pertinent to the matter under inquiry shall be deemed guilty of a misdemeanor".[34]

The congressional pactice of using the statutory method in dealing with recusant witnesses has allowed the courts to apply legal and judicial standards to some phases of investigative activity. Under this procedure, for instance, the use of coercion is definitely affected by the judicial interpretation of the two statutory offenses, "willful default" and "refusal to answer". An increasing body of precedents has tended to eliminate any sharp distinction between the two and to emphasize underlying intent.[35] The failure to produce papers, not specifically dealt with in the statute, has been treated as a type of default.[36] The term "wilful" appears in the statute only in relation to default, but refusal to answer has been held to mean a "deliberate and intentional" act and "not an inadvertence, an accident, or a misunderstanding".[37] The rejection of the contention that there must be "evil or bad purpose"[38] accords with the holding of the Supreme Court that good faith is not a defense.[39] The witness who refuses to answer does so at his peril.[40] There must be intent to refuse, however.[41]

By a similar process the requirement of "pertinency" also is under the controlling influence of judicial interpretation. In construing this term, the Supreme Court in the *Sinclair* opinion[42] emphasized the relation of "the facts called for by the question" to the subject matter while a recent appellate opinion declares that pertinency relates to the question and not the answer.[43] The latter decision also narrows the force of statements in the *Sinclair* opinion which had been taken to mean that pertinency is a question of law and not for the jury.[44] Each case, it may

(*Continued on page 1097*)

30. The converging point may have been reached in a recent case where the Supreme Court acknowledged that it strained its interpretation of House resolutions in order that the impropriety of a request for book distribution lists might rest upon a lack of committee authority rather than upon the want of congressional power under the Constitution. *United States* v. *Rumely*, 345 U.S. 41 at 47, 57, 73 S. Ct. 543, 97 L. ed. 770 (1953).

31. *Anderson* v. *Dunn*, 6 Wheat. 204 at 231 (U.S. 1821).

32. *McGrain* v. *Daugherty*, 273 U.S. 135 at 176, 47 S. Ct. 319, 71 L. ed. 580 (1929).

33. *Sinclair* v. *United States*, 279 U.S. 263 at 291, 292, 40 S. Ct. 268, 73 L. ed. 692 (1929). The language here varies slightly from the quoted clause in the *McGrain* opinion.

34. 52 Stat. 942, 2 U.S.C., §192 (1946).

35. Appellate court decisions have held "default" to include a departure in the midst of a hearing, *Townsend* v. *United States*, 95 F. 2d 352 (D.C. Cir. 1938), cert. denied, 303 U.S. 664, 58 S. Ct. 830, 82 L. ed. 1121 (1938); and a failure to answer a summons after a previous voluntary appearance, *Dennis* v. *United States*, 339 U.S. 162, 70 S. Ct. 519, 93 L. ed. 734 (1950); while two witnesses whose appearance was so uncooperative that a swearing-in did not occur, were deemed guilty of refusal to answer, *Eisler* v. *United States*, 170 F. 2d 273 (D.C. Cir. 1948) dismissed per curiam subsequent to petitioner's flight from the country, 338 U.S. 883, 70 S. Ct. 181, 94 L. ed. 542 (1949); *United States* v. *Josephson*, 165 F. 2d 82 (2d Cir. 1947), cert. denied, 333 U.S. 838, 68 S. Ct. 609, 92 L. ed. 1122 (1948).

36. *United States* v. *Bryan*, 339 U.S. 323 at 326, 327, 328, 70 S. Ct. 724, 94 L. ed. 884 (1950). See also, *Barsky* v. *United States*, 167 F. 2d 241 (D.C. Cir. 1948), cert. denied, 334 U.S. 843, 68 S. Ct. 1511, 92 L. ed. 1767 (1948), and *United States* v. *Fleischman*, 339 U.S. 349, 70 S. Ct. 739, 94 L. ed. 906 (1950). The *Bryan*, *Barsky* and *Fleischman* cases concerned records of the Joint Anti-Fascist Refugee Committee. Other cases of requests by committees investigating subversive activities for records of associations include *Marshall* v. *United States*, 176 F. 2d 473 (D.C. Cir. 1949), cert. denied, 339 U.S. 933, 70 S. Ct. 663, 94 L. ed. 1352 (1950), records of National Federation for Constitutional Liberties; and *United States* v. *Flexner*, 112 F. Supp. 669 (D.Col. 1953), union records.

Other instances of failure to produce papers include: *Fields* v. *United States*, 164 F. 2d 97 (D.C. Cir. 1947), cert. denied, 332 U.S. 851, 68 S. Ct. 335, 92 L. ed. 421 (1947), failure to specify expenses reported to committee investigating disposition of war surplus property as "brokerage to John Doe"; *Kemp* v. *United States*, 176 F. 2d 618 (D.C. Cir. 1948), cert. denied, 339 U.S. 957, 70 S. Ct 977, 94 L. ed. 1369 (1950), relating to campaign expenditures.

37. *Bart* v. *United States*, 203 F. 2d 45 at 49 (D.C. Cir. 1952).

38. *Townsend* v. *United States*, 95 F. 2d 352 at 358 (D.C. Cir. 1938) cert. denied, 303 U.S. 664, 58 S. Ct. 830, 82 L. ed. 1121 (1938); *Fields* v. *United States*, 164 F. 2d 97 at 99, 100 (D.C. Cir. 1947), cert. denied, 332 U.S. 851, 68 S. Ct. 355, 92 L. ed. 421 (1947).

39. The trial court rightfully "excluded evidence that in refusing to answer he acted in good faith on the advice of competent counsel. The gist of the offense is refusal to answer pertinent questions. No moral turpitude is involved. Intentional violation is sufficient to constitute guilt." *Sinclair* v. *United States*, 279 U.S. 263 at 299, 49 S. Ct. 268, 71 L. ed. 692 (1929).

40. *Ibid.* See also *Emspak* v. *United States*, 203 F. 2d 54 (D.C. Cir. 1952), cert. granted October 12, 1953, 22 U.S. Law Week 3030.

41. When a witness raises an objection, the inquirer must guard against leaving the impression that he has abandoned the question. A specific direction to answer after a refusal may not be necessary, however, if an intent to refuse is determinable from all the circumstances. *Bart* v. *United States*, 203 F. 2d 45 at 49, 51 (D.C. Cir. 1952).

42. *Sinclair* v. *United States*, 279 U.S. 263 at 299, 49 S. Ct. 268, 73 L. ed. 692 (1929).

43. *United States* v. *Orman*, 207 F. 2d 148 at 154 (3d Cir. 1953).

44. "Courts have said that the question is one of law . . . . But in Sinclair the Supreme Court explained that the 'question of pertinency . . . was rightly decided by the court as one of law. *It did not depend upon the probative value of evidence.*' [Emphasis added]. In the instant case, however, evidence *aliunde* was introduced to prove pertinency. The weight and probative value of this evidence was for the jury, particularly since pertinency was an element of the criminal offense." *United States* v. *Orman*, 207 F. 2d 148 at 155, 156 (3d Cir. 1953).

Pretrial Preparation:

Some Personal Observations

by Earle N. Genzberger • of the Montana Bar (Butte)

■ Mr. Genzberger thinks that too many lawyers go into court unprepared. Declaring that a "case well prepared is half won", he recounts some of his own personal experiences to illustrate his point. This article was taken from an address delivered at the Pacific Regional Meeting, held last May in Portland, Oregon.

■ After almost forty-two years of experience, I realize that too often many lawyers accept a case, open the file, file a complaint or an answer if they are defending the case, and then let the matter rest until the client becomes insistent or restless or until the court sets the case for trial, perhaps a week or ten days ahead. Then feverish last-minute preparation will bring forth a form of verdict, a few subpoenas, and then we go to court and trust to luck.

Admittedly an action on a promissory note, an ordinary contract, or even an action for negligence arising out of an automobile accident falls into a familiar pattern for the veteran lawyer, and ordinarily such a case should involve no great amount of pretrial preparation. But on the other hand, a case involving fraud, an equity suit, a will contest, an antitrust suit, or a suit for specific performance or reformation of a contract will involve very careful preparation both on questions of law and fact.

Therefore, we start with the premise that a case well prepared is half won. Thorough preparation gives confidence and secures against surprises.

The first thing that a lawyer must do is to get *all* the facts from his client—a *full* statement from the client is all-important in the prosecution or defense of any lawsuit. After the client has made his statement, any experienced lawyer knows that it is necessary that the lawyer verify the facts given him by his client because all too often it is human nature to make statements which one cannot support, and it is not unusual for your client to give himself either the best of, or the worst of, the statement.

Let us now assume that the pleadings have been drawn, the issues framed, and we are now ready to prepare for the trial. First of all, I think that it is well to prepare a visual chart or draft of the pleadings showing the allegations on either side and whether they are denied or admitted.

Next, the lawyer should study what he or his opponent will have to prove to sustain the pleadings. This list of issues should be accompanied by the names of the proposed witnesses to prove each of the facts which must be established.

At this point also there should be a brief of the law applicable, and if preliminary motions are to be made, an outline of such preliminary motions together with the authorities sustaining them, as well as the authorities which might oppose the position to be taken by the lawyer. Familiarity with the latter is frequently more important to the trial lawyer than the former.

Too many of us look up our law after we are on the way to the Supreme Court, when a fraction of that work employed prior to the trial would have availed us much more. It would have saved ourselves and our clients much time and money. Thorough investigation of the facts of any involved lawsuit is always necessary.

I remember a case in which the client was facing a charge of manslaughter and auto theft. Three boys stole or borrowed a car and drove out into the country and one of the boys was killed. The surviving boys attempted to place the blame on the deceased boy. They told us the story of how they were sitting in the car and what the deceased boy was alleged to have done as the supposed driver. We thought it best to investigate the facts and an examination of the car itself showed that the deceased boy was sitting on the extreme right and had gone through the top of the car. The other boys later admitted the truth of our deductions, and we had to adopt different tactics for our defense of the two boys who survived. We were successful in doing it, not because of the boys themselves,

but in spite of them. Incidentally we are still waiting for our fee.

Interviewing the various witnesses both for and against you is most important. Frequently, however, we find that the witness who has been subpoenaed by the other side or who expects to be called by the other side thinks that he is on a team and that he must play the game with the side that calls him first. It usually takes tact and diplomacy to secure a statement from such a witness, and it may mean the process of taking deposition, which is always open to you. Sometimes that involves expense which the client does not care to bear.

In interviewing your witnesses previous to trial, many interesting things will come up. I recall an early case involving a streetcar accident wherein the best eye witness was a little girl about the age of twelve. Counsel for the plaintiff were fearful of putting this little girl on the stand, but decided to have her come to the office and tell her story. They warned her against volunteering any information and admonished her to answer only the questions asked of her, and then if she didn't tell enough, they would ask a further question. By the time they had interviewed this little girl in the office about three times, they were satisfied with her story—each knew the questions that they were going to ask and the answers that they would receive. They decided that the little girl was such an ideal witness that they would put her on just before resting their case so that her story would remain fresh in the minds of the jury.

At the trial the plaintiff's case was nearing the end, when the star witness, the little girl, was produced. Attorney for plaintiff asked the first question, "What is your name?", and you can imagine the surprise of all present when the little girl said, "My name is Margaret Jones. I go to the McKinley School. I'm twelve years old, and I saw the accident. I was riding on the streetcar, etc." She told the whole story without even pausing for breath in answer to the first question, "What is your name?". Fortunately, however, the juries in those days didn't pay much attention to the defense, and the verdict against the streetcar company was a matter of course.

No ethical, self-respecting lawyer will coach a witness and tell the witness what to say. Yet I have heard so-called reputable lawyers say that the practice of the law is no longer a profession but is a business and that the verdicts go to the side that can tell the best lies. This, I believe, is a slander upon the legal profession. It is the rare exception rather than the rule, although the lawyer who made that statement has been quite successful in personal injury cases.

In the use of expert witnesses, great care and preparation prior to trial will pay off in the long run, whether the expert is for the plaintiff or for the defense. The lawyer should know his facts; and if medical testimony is being used in either a will contest, showing the mental condition of the testator, or in a negligence or an insurance action, the lawyer should know thoroughly the various symptoms and the functioning of those portions of the body affected. He should go over the case with a competent expert and know how to qualify the expert when he gets him in court, know what questions to ask and what questions not to ask.

My partner tells me of a case involving war risk insurance wherein a prominent Idaho lawyer followed this course and had several pages of questions that he proposed to ask an eminent doctor and the answers that each question would elicit. Unfortunately the lawyer lost his papers on the way to court, and the opposing counsel found them. The latter said that he never used the papers which he found, but the incident illustrates one of the dangers that you may face. If you prepare such a paper for the witness and yourself, then guard it carefully and do not lose it in the courthouse corridor.

Experts for both the plaintiff and for the defendant can be wrong. One of the outstanding examples of a mistake by experts is found in the old case of *Doolin* v. *Omnibus Cable Company*, 57 Pac. 774, where the plaintiff claimed damages for injuries sustained when the horses drawing a horse car raced out of control of the driver and pulled the car over an embankment. The plaintiff complained of a tumor allegedly caused by the accident, and the court appointed six doctors, three for the plaintiff and three for the defendant. These experts examined the woman and agreed on a tumor the size of a coconut, which the plaintiff's doctors said had been increasing in size regularly since the accident. The woman obtained a verdict for $20,000 against the streetcar company and ten days after the verdict gave birth to a stillborn but full-time child. The court granted a new trial on the grounds of excessive damages, when the plaintiff refused to remit $5,000 of the verdict. The California Supreme Court posed this question in the course of its opinion:

> Since the time of Mr. Pope, it has been often inquired "Who shall decide when doctors disagree?" This case shows serious error may lurk in their conclusions, even when they have agreed.

In the federal courts new rules have now given to both parties ample means of exploring the facts prior to trial.

Since the year 1938 with the adoption of the new Federal Rules of Civil Procedure, there has been provided for litigants in the federal courts a vast new field of exploration in the preparation of cases for trial. Rules No. 26 to 37 govern the taking of depositions, and they provide that any party may take the testimony of any person, including a party, by deposition upon oral examination or written interrogatories for the purpose of discovery or for use as evidence in an action or for both purposes. It is important for any litigant in the federal court to carefully examine these rules to ascertain whether in the preparation of a case it is necessary that he should take depositions for the purpose of obtaining the testimony of a witness or of discovering and learning the true facts about his case, which may be obscure and which may be within the peculiar knowledge of his adversary.

These rules are designed to obtain

evidence for use at the trial, to secure information as to the existence of evidence which may be used at the trial and to ascertain how and from whom it may be procured as, for instance, the custody and location of pertinent documents or names and addresses of persons having knowledge of relevant facts. The lawyer in preparing his case at times will be confronted with a situation where he suspects that a certain set of circumstances or certain facts exist. But from the information he has, he has no way to prove the facts. So the use of the deposition rules is salutary and important.

Rule No. 26 is used extensively in connection with Rule 34 of the Federal Rules of Civil Procedure, which provides that a party, upon good cause shown and upon notice, can, in a pending action, obtain an order upon any party to produce and permit the inspection, copying or photographing by or on behalf of his client of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things not privileged, which constitute or contain evidence relating to any of the matter within the scope of the examination permitted under Rule No. 26 and which are in the possession, custody and control of the party whose deposition is being taken.

The importance of this rule is at once apparent. It not only enables the counsel to develop all of the available facts which can be used in connection with Rule No. 26, but it enables the attorney, when used with Rule 36, which provides that after the commencement of an action, the party may serve upon any other party a written request for the admission by the latter of the genuineness of any relevant documents, or the truth of any relevant matters of fact as set forth in the request, to eliminate many of the issues in a case, and thus shortens the time of trial. It also enables the counsel to be in a position to require his adversary to produce evidence which otherwise he would not be able to procure.

These rules were formulated with the intention of granting the widest latitude in ascertaining the facts in dispute *before trial* with the view of simplifying the issues. Under the old practice neither the defendant nor the plaintiff was entitled to discovery of an inquisitorial character, as we used to call it, "a fishing expedition", as to the ground of action or to the defense of the other. Under the present rule discovery may be had now to ascertain facts relating not only to his own case but to his adversary's also.

The issues simplified, proof on those remaining will be available when it is needed in the form to be the most effective.

I have said nothing heretofore about the pretrial conference. This is used extensively in many states and in the federal courts under Rule 16. It was my privilege several years ago to be the guest of Judge Frank Picard of the Southern District of Michigan during the hearing of a pretrial calendar in his chambers.

There, five cases of different character came before him that afternoon. He called the lawyers together and asked what the issues were in the pleadings and if any amendments were necessary. Then each of the denials was discussed, and by agreement of the parties the issues were narrowed to certain issues of fact which plaintiff would be called upon to prove. The documentary exhibits were examined and numbered. He inquired of each set of counsel whether terms of settlement had been explored and how close the parties had come to settling.

In one or two cases, terms of settlement were discussed in the judge's chambers. In those cases where settlement was not made, the judge made a pretrial order, setting forth what the issues were, what documents could be introduced by each side and what the jury would be called upon to determine.

In 1939 the Montana legislature provided for pretrial conferences, but abuses of the practice, probably through lack of understanding by several of our district judges, made a farce of the procedure and more harm than good was done. Through the almost unanimous demand of both the Bar and Bench in Montana, the 1949 legislature repealed the pretrial conference law.

Earle N. Genzberger is a member of the Montana Bar, in active practice since his graduation from the University of Michigan in 1912. He has been active in his local and state bar associations as well as having served on several committees of the American Bar Association, the American Counsel Association, and is also a member of the American Judicature Society.

I have been on the bar association's Committee for the Improvement of the Administration of Justice for several years, and our Committee has made a study of pretrial procedure and has favored it. In fact, they sponsored the 1939 legislation, making it a part of Montana judicial procedure; yet I am prepared to concede that unless it is handled properly and diplomatically by both the Bench and the Bar, it is not desirable. It will take several years of trial and error, in my opinion, with the sympathetic leadership of such leaders on the Bench as Judge Ira Jayne, of Detroit, Michigan; Judge Bolitha J. Laws, of the District of Columbia; Judge Claude McColloch and Judge James Alger Fee, of Oregon, and others, before it can be made an effective tool in the administration of justice.

I have heretofore stated what should be in a trial brief and all the authorities seem to agree that no lawyer should go to court to try a case of any importance (all cases are important to the parties involved) without a trial brief. But when we speak of the use to which a trial brief is to be put, that brings up some controversy. Some years ago I was on the state bar committee which recommended the uniform system of District Court Rules for all our district courts in the state, which we asked to be promulgated by the Supreme Court of Montana.

Among the rules was the requirement that a trial brief be filed five days before trial by both sides in every litigated case. Some judges still require this by court rule. From all over the state came attorneys protesting the adoption of this rule and even some judges joined them in this protest. Of course the protest stemmed from the old belief that the trial of the lawsuit was some sort of a competitive game—administration of justice was secondary. The old-time members of the Bar could not see the logic and prophesied dire results from disclosing their trial strategy to the opposing side. Obviously, if an attorney has a point of law of which he thinks the opposing counsel is not aware and which will upset the theory of his opponent's case, it would be foolish to disclose the point too early and before the trap is sprung, lest his opponent, being apprised of the tactic, might change his theory and alter his proof. But this is the exception rather than the rule, and I feel it is only fair to the court to give the court time to look into the law and determine the soundness of the theory which you propose to present to him in the trial of the action.

Too often we attorneys do not realize that the points of law which have taken us weeks, or sometimes months, to work out must be decided by a court at a moment's notice, in the course of the trial of an action in passing upon an objection to testimony or in deciding a motion made during the trial.

I feel it is due to the court to apprise him of these proposed moves in advance of the trial in order that he may examine the cases upon which you rely and satisfy himself as to the general law upon the subject. He certainly does not have that opportunity during the course of the trial without entailing long recesses and delays, which are expensive both to the litigants and the taxpayer. A trial brief should at least be given the trial judge. Whether or not the trial brief should be served upon the opposing party is a question which is the subject of controversy among the members of the Bar. Unquestionably, if the court is furnished with the memorandum, it is a matter of courtesy to serve the opposing counsel though Canon 17 of Judicial Ethics requires service of a trial brief on opposing counsel. In my experience few counsel have done so. On the other hand, if both counsel will furnish the court with copies of their respective trial briefs without serving the opposing counsel it is better than having no briefs at all. Unprepared counsel pays the price in the long run.

I have seen cases where one side has presented a brief and served it upon counsel, but the opposing counsel has stated frankly in court that he has not had an opportunity to prepare a trial brief. I think that may illustrate, however, a difference between coming into the court prepared—and unprepared.

Regional Meetings

Scheduled for 1955

(1) There will be a Regional Meeting in Phoenix, Arizona, April 13-16, 1955, for the States of Arizona, California, New Mexico, Colorado, Nevada and Utah, under the chairmanship of Walter E. Craig, Phoenix National Bank Building, Phoenix, Arizona.

(2) There will be a Regional Meeting in Cincinnati, June 8-11, 1955, for the States of Ohio, Michigan, Indiana, Illinois, Kentucky, Tennessee and West Virginia, under the chairmanship of Grauman Marks and the vice chairmanship of William H. Nieman and Francis L. Dale, all of Cincinnati.

(3) There will be a Regional Meeting in New Orleans, Louisiana, November 27-30, 1955, for the States of Florida, Georgia, Alabama, Mississippi, Louisiana, Texas, Oklahoma, Arkansas and Tennessee, under the chairmanship of Cuthbert S. Baldwin and the vice chairmanship of Joseph M. Jones, Richard B. Montgomery, W. Ford Reese and William W. Young, of New Orleans, and Thomas W. Leigh, of Monroe.

(4) The meetings at Phoenix and Cincinnati will come in the 1954-1955 year, and the meeting at New Orleans will come in the 1955-1956 year. We hope to have one or more additional meetings for the year 1955-1956 and are now in touch with prospects who are interested in setting up and promoting such additional meetings.

Books for Lawyers

THE JACKSONIANS: A STUDY IN ADMINISTRATIVE HISTORY, 1829-1861. *By Leonard D. White, New York: The Macmillan Company. 1954. $8.00.*

A resourceful toy-maker is selling sets of statuettes each of which is a portrait of a president of the United States. I have read Professor White's *The Jacksonians* with a set of these statuettes beside me—arranged in chronological order. Together they form an impressive group. Had each of them been given a distinctive livery to indicate his political party, it would have been possible to recognize at a glance Federalists, Democrat-Republicans, Democrats, Whigs and Republicans. The label "Jacksonian" has, however, been given by Professor White to all the Presidents from Jackson to Buchanan, inclusive, but with this explanatory comment: "From the political point of view the Jacksonian period may be said to have terminated in 1845. From the administrative point of view it continued in substance, whether Democrats or Whigs were in office, until it was broken off abruptly by the secession of the Southern States." In other words, while four of the nine Presidents who held office between 1829 and 1861 were elected as Whigs they are included in the Jacksonian group because, administratively, all were subject to the dominant influence of Old Hickory; for neither the good nor the evil that he did was interred with his bones.

The distinction thus recognized between politics and administration must be borne in mind by the reader of Professor White's three books—of which *The Jacksonians* is the third. "More than a century", he observes in the preface to the present volume, "has come and gone since Harrison proposed an administrative history and Webster yearned to undertake it." Then, after noting the vast accumulation of material which is now accessible, he adds "The documentary record has provided me, I hope, with substantially the truth; the reflections on it are principally those of contemporaries, not those of the author."

Having addressed himself to the task which Harrison envisioned and which Webster fain would have performed, Professor White has steadfastly pursued his objective. His two earlier volumes were well received and gained for him a distinguished place among American historians. It is a safe prediction that this, the latest and last volume, will be adjudged worthy to rank with its predecessors. The mere collection and arrangement of material must have been a task of vast proportions and the analysis, evaluation and presentation of the facts obviously called for tireless industry and literary qualities of a high order. During the thirty-two years of the Jacksonian period the people of the United States were experiencing bewildering economic, social and industrial changes, and the public men of the day were called upon to solve problems of a complexity to which their predecessors were strangers. Great as is our debt to the architects and designers of the Republic, we need to be reminded of the difficulties encountered by those whose responsibility it became to translate theory into practice and convert a statesman's dream into a living reality. The present volume is such a reminder, and nobody can read it without realizing that an important addition has been made to his educational equipment. For one thing, the reader will realize (perhaps for the first time) that while by 1860 the national Government was doing little more for the citizen than in 1830, yet the state and municipal governments were being called upon with greater and greater insistence to deal with conditions arising from bank failures, railroad impositions, insurance agent frauds and an influx of immigrant paupers, and to meet the urgent demands for municipal service in water supply, sewage disposal, vaccination, public health, police and fire protection and the education of children. "The administrative history of the states and cities" observes the author, "becomes now a matter of much importance to a full understanding of the overall system that served the needs of the American people."

Each of the author's chapters subsequent to the first and prior to the last three deals with a specified set of administrative problems. The first chapter contains, by way of introduction, an exposition of the state of the nation and its administrative system. Then follow luminous accounts of the way in which administrative problems confronted and were dealt with by successive Presidents and by the heads of Departments. The struggle for power between President and Congress is then described in two interesting chapters —one dealing with executive appointments and the other with finance. In the chapter on appointments there is an interesting account of the controversies over the Tenure of Office Act. Reviewing this phase of the struggle, our author observes that Jackson's successors (other than Tyler) preferred accommodation to belligerency and that by 1861 the legislative branch stood relatively a victor even though the executive still held high ground.

The administrative history of the Treasury, of the Navy and of the Post Office is dealt with in successive chapters; and these are followed by lucid discussions of the theory and practice of rotation, of compensation and of the career service and the personnel system. Public service ethics, government and the public economy

and government and science respectively receive a due share of attention. The method of thus breaking down the subject into specific categories yields better results than if the narrative had taken the form of a lumping treatment of each administration. As it is, the reader is able to trace the development of each administrative problem in its proper setting. The final chapters on "Administrative Dualism", the "State of the Administrative Art" and on "Democracy and Administration" are among the most instructive in the book.

> For the convenience of the lay reader [says the author] I have inserted at the end of the book a *List of Important Characters* which may be helpful for quick reference. Many of the men who played a useful, or at times a spectacular, if not useful role in the domestic affairs of the nation from 1829 to 1861 are now unknown. Some deserve a better fate.

Professor White's treatment of highly controversial subjects is dispassionate and fair. If he has erred at all, it is in suppressing his own opinions instead of expressing them *ex cathedra*. As each phase of the subject is discussed the reader develops that kind of confidence in the author which partisan commentators seldom command. One rises from a reading of the volume with a consciousness that many subjects previously obscure have been illuminated and made plain. He has been supplied with a background and a method for his own study of the many administrative problems which await solution.

GEORGE WHARTON PEPPER
Philadelphia, Pennsylvania

MY HERO. *The Autobiography of Donald Richberg. New York: G. P. Putnam's Sons. 1954. $5.00. Pages 360.*

At the very start, let me hasten to say *My Hero* refers not to F.D.R., but to Donald Richberg. With his tongue in his cheek, the author refers to his own ideal, but promptly and humbly acknowledges that he never realized it. Everyone who I have heard speak of the book said that he had presumed before seeing it that it was another biography of Franklin Roosevelt. That is unfortunate and may affect the sale of the book.

The book should be of interest to lawyers because Don Richberg has played an active part as a lawyer during the last forty years of our hectic history. Don says that at all times he considered that he was serving the people. It is a severe test of a man's legal judgment and professional character to take an active part in public affairs while the character of government changes from irresponsible plutocracy to irresponsible democracy. The true lawyer is not satisfactory to either extreme. His only compensation is the thought that he has helped to keep the ship of state on even keel.

If you are a victim of mental inertia; if you have fixed ideas as to all the men and measures that have claimed public attention during the last quarter century; if you belong to that class whose thoughts of T. R.'s Square Deal and F. D. R.'s New Deal, and Wilson's New Freedom, can be expressed only in billingsgate; or if you belong to that class who speak of champions of the Constitution and guardians of private property, as moss-backed reactionaries and economic royalists—if you are a confirmed member of any extreme group or a blind champion of any union, block, or association, then do not read this book. It will no doubt irritate you by disturbing your fixed convictions.

If, however, you still have an open mind and still seek information regarding the causes of the recent great transition, and if you are interested in a more intimate understanding of the personalities and motives of the men who played prominent parts in such transition, then do not postpone the reading of this book.

When a busy lawyer is also an active participant in public affairs, and is also literary—when he has participated in the great issues of his time and known intimately the great characters of his time, and has also the gifts of the two cousins, the poet and the philosopher, and has also the gift of the Word, he can be a great boon to his fellows and render inestimable assistance to historians. Great lawyers of former times, such as Cicero and Pliny, have become original sources of great value to students of their time. Richberg's book will not be overlooked by future students of our time.

Some one once said that Newton Baker exemplified the difficulty of being a gentleman in a democracy. That may be said also of Don Richberg, and it may be said of both men that their lives exemplify the difficulty of maintaining scholarly and professional ideals while taking an active part in public affairs during a social, political and legal revolution. It is the fate of the true lawyer to occupy middle ground. He is prompted to champion needed reforms, and then when the reforms become popular and are carried too far by radicals and demogogues, he is compelled to oppose extreme measures. He then is denounced as a deserter by those whom he formerly led. On the other hand, he is given no credit or support from those who opposed reform; they denounce him as one who started the trouble.

Not only many good lawyers, but many good citizens will read this book with poignant sympathy. Many Americans who championed the New Deal in its early stages had to abandon it and oppose it when it drifted away from constitutional restraints and championed measures that favored statism or even more extreme isms. Political movements swing like the pendulum and it is the province of the true lawyer to keep the swing from going too far. He, therefore, as a rule, is not acclaimed in his own day, and his services can hardly be appreciated until they are viewed in a more distant perspective.

Don Richberg had an inclination to write, which began early in life and persists to the present day. He is master of an easy and ingratiating style. His meanings are clear and precise. His style of writing is more incisive than his judgments of other

men. He is so warmhearted and so generous that one sometimes feels that he is too kind. For instance, his views of Lilienthal will not be accepted by men who have known Arthur Morgan and have had some understanding of the differences between those two men, regarding practices and policies of the T.V.A. Lilienthal adopted practices which the champions of T.V.A. had condemned in private industry. The President's support of Lilienthal and dismissal of Morgan is a vivid portrayal of the weakness of the Roosevelt Administration. In its later years, it took counsel of the wrong men and favored those who lacked understanding of the true principles of our American way of life.

In his criticism of Ickes, it seems that Richberg is most forthright and severe, but even there his criticisms seem "sicklied o'er with flattery", or warm apologies. He is quite perceptive of personal characteristics and motives, as when he points out that Ickes' great failing was that he mistrusted everyone else and made his closest associates feel his mistrust. Those who came into contact with Ickes during development of some of the P.W.A. projects would agree not only with Ickes' own statement that he was a curmudgeon, but also with the statement of a worthy director of one of the projects, who said, "Ickes is the meanest and most irascible man that ever held public office in America."

But whether you agree or disagree with Richberg's estimates and comments, you will find them interesting. At the end of the book you will feel that you have a better understanding of the critical times through which you have lived, and a more intimate acquaintance with some of its prominent personalities. You will also have a more profound understanding of life. Don Richberg may be a political victim, but he is not an intellectual victim of his age. He has viewed our times in historic and philosophic perspective.

ROBERT N. WILKIN

Washington, D. C.

ANNUAL SURVEY OF AMERICAN LAW. 1953. *Edited by Robert B. McKay. New York: New York University School of Law. 1954. $10.00. Pages 1030.*

The surveys of 1953 are as fine as ever, if not better. Naturally, I can judge best in the fields I know the best. Nothing could be better done than the reviews of military law by John V. Thornton, trade regulation by Walter J. Derenberg, corporations by Miguel A. de Capriles and Bert S. Prunty, Jr., bankruptcy by Charles Seligson, federal jurisdiction and practice by Herbert Peterfreund, evidence by Judson F. Falknor, jurisprudence by Edmond Cahn, judicial administration by Shelden D. Elliott, civil procedure in state courts by Delmar Karlen and Gerald Moss and legal bibliography by Julius J. Marke. As one who has labored in these fields my hat is off to the magnificent job that these writers have done.

There is no lawyer in America who can afford to be without these annual volumes. It is like asking the New York University Law Faculty to come into your office and advise you and your staff as to the new developments in their fields during the year 1953. It is the cheapest $10 investment a law office that wants to keep up to date can make.

If my friend Lurton Whiteman at Hornellsville, New York, who specializes in defending bulls that jump fences at Brown's Crossing, feels that this annual survey is indispensable to him (as he does) in *his* practice, then I have no doubt that every law office, agrarian or metropolitan, will find the survey equally valuable.

Subjects covered in the 1953 volume of equal excellence to the ones mentioned but ones with which I am not so familiar are:

> International law by Cecil J. Olmstead, the United States and the United Nations by Clyde Eagleton, conflict of laws by William Tucker Dean, constitutional law and civil rights by Ralph F. Bischoff, administrative law by Bernard Schwartz, criminal law by J. Walter McKenna, federal income taxation by Harry J. Rudick, federal estate and gift taxation by Joseph Trachtman, state and local taxation by Jerome R. Hellerstein, labor relations law by Sylvester Petro and Robert F. Koretz, food, drug and cosmetic law by David A. Vernon, public housing, planning and conservation by Herman D. Hillman, local government by William Miller, copyright law by Walter J. Derenberg, patent law by David S. Kane, contracts by Francis J. Putman, agency and partnership by George H. Williams, banking and negotiable instruments by Lawrence P. Simpson, sales by Ray Garrett, Jr., insurance by William F. Johnson, transportation law by Arnold W. Knauth, admiralty and shipping by Nicholas J. Healy III, arbitration by Martin Domke, torts by John V. Thornton and Harold McNiece, family law by Frank R. Lacy, Jr., real and personal property by Elmer M. Million, landlord and tenant by Hiram H. Lesar, vendor and purchaser by Ralph E. Kharas, mineral law, oil and gas law, and water law by Clyde O. Martz, mortgages by Godfrey E. Updike, future interests by Bertel M. Sparks, trusts and administration by Dean Russell D. Niles of New York University, and criminal procedure by Kenneth Kaplan.

This gives a good idea of the breadth of the coverage.

Doubts of skeptics as to the successful compression into one volume of the law of the fifty-odd American jurisdictions have proved without foundation. The reviews have been uniformly laudatory and year to year the audience has increased. No wonder the *Annual Survey* has become the one comprehensive source of information available to lawyers, judges and law teachers respecting the progress of American law.

This annual volume like its predecessors and its successors should lie on your bed table. Covering, as you see it does, forty-one areas of the law surveyed by forty-seven contributors it will be handy for ready reference as your practice directs your attention, now in this field, now in that. There are 842 pages of text and you can be sure of at least half a dozen useful ideas almost every time you browse in it. To make reference more ready, the articles are collected under main headings such as "Public Law",

"Commercial Law", "Property and Procedure", "Legal Philosophy and Reform", "Legal Bibliography" and the like.

The unsung hero of a successful survey publication such as this is the editor. The 1953 editor is the very efficient Robert B. McKay. What a good job he did! In his task he had the aid of Isaac Ciechanowicz, Dorothy L. Killam, Fannie J. Klein and Henry B. Pogson, and the editors of the *New York University Law Review* that published all the pieces in the bound volume except the piece on legal bibliography by Julius Marke.

Having all the survey articles bound in one volume is itself a priceless convenience. But the 1953 bound volume has not only a table of cases, statutes and administrative materials like the others, but, most important of all, a seven-year cumulative topical index. Prepared carefully and with extreme skill by Isaac Ciechanowicz, it is of great value to both new subscribers and persons who have been taking the *Survey* regularly. A glance at this index indicates beyond doubt the comprehensiveness of the materials within the *Survey* volumes.

You cannot afford to be without this survey. Take your pen in hand and order it.

ARTHUR JOHN KEEFFE
New York, New York

MILITARY LAW. *By Daniel Walker. New York: Prentice-Hall, Inc. 1954. $9.75. Pages xiv, 748.*

This is a casebook on military law and challenges the field hitherto occupied by Professor A. Arthur Schiller's *Military Law* (West Publishing Co., 1952) and *Military Jurisprudence* (Lawyers Co-operative Publishing Co., 1951), the latter the so-called "Army" compilation resulting from collaboration of officers of the Judge Advocate General's Corps of the Army.

Vital statistics are as follows: the present work comprises 707 pages, exclusive of the Uniform Code of Military Justice which is reprinted as an appendix. Professor Schiller's work contains 585 pages; the Army work, 1313 pages. Neither of the latter contains any connecting text; each limits itself to a re-print of cases, statutes, regulations, etc., without discussion or explanation. The present work, however, has valuable introductory explanations of each branch of military law. In addition, six chapters dealing with the operation of the court-martial system conclude with problems. These are designed to aid teacher and student in the discussion of applicable principles—a feature carried to its ultimate in Hart and Wechsler's admirable *The Federal Courts and the Federal System.*

The present work is intended for classroom use in law schools, more and more of which are offering a course in military law for purely utilitarian purposes. It has, however, an added usefulness. We are apt to forget that law schools are properly part of a university whose end object, as the name implies, is universal knowledge. Of this, the law is a part, exemplified by Sir William Blackstone writing his *Commentaries,* not for lawyers, but for the undergraduates at Oxford who were presumed to have a gentleman's interest in the subject. No better cross-section of the subject of military law can be obtained than through examination of the present work. It is like a series of essays in a book of modern criticism by specialists in their fields; the essays here, however, are authoritative court decisions linked together by pungent text. They show the history and present status of the subject.

By reason of his background as Commissioner of the United States Court of Military Appeals, the author is exceptionally familiar with the jurisdiction and procedure of that court. This is reflected in the extensive treatment of military criminal law, its nature, history and sources (Chapter 3); the nature of offenses under military law (Chapter 4); the make-up of courts martial (Chapter 5); pre-trial procedure (Chapter 6) and jurisdiction of courts martial, their trial procedure, rules of evidence and the review of their decisions (Chapters 7-10). Over 350 pages are devoted to these practical aspects of military law. In addition, seventy-five pages are devoted to civil court review (such as it is) of courts-martial decisions. The average lawyer unfamiliar with the court-martial system can get enough out of these chapters to enable him to make a start at least in representing a client before a court martial or on appeal.

In addition to courts martial and their procedure, Mr. Walker's work discusses extensively martial law and military government (Chapter 13), the law of war and military tribunals (Chapter 14); the financial and contractual relations of officers and enlisted men with the Government (Chapters 15 and 16); the liability of servicemen in civilian criminal courts (Chapters 15-17); the civil rights and liabilities of servicemen and the civil relief acts (Chapters 18-19).

A work of this magnitude, particularly the chapters on martial law, military government and the law of war, brings sobering thoughts. The danger of atomic attack inevitably suggests the possibilities of martial law. For, depend upon it, atomic attack will inevitably result in a cry for the Army. However admirable our development of civil defense agencies, it cannot be expected that we can so quickly unmake human nature. In an emergency the people have only one instinctive life-saver in their desperation—the cry is: call out the Army, declare martial law. This has been the rule since ancient Rome, since, indeed, the dawn of organized society. We suggest, with diffidence, it will be the rule tomorrow and this is said with due respect for the admirable work the civil defense agencies are now doing. If there be no real defense to the atomic bomb, then the worse the attack, the louder will be the cry, and always for the Army, which in some miraculous way is supposed to be able to take care of the civil population, including the civil defense workers.

If so, we may well study martial law and find out how the system

works and what are the rights of all concerned under it. Curiously enough the United States operated the longest regime of martial law in modern times—in Hawaii from Pearl Harbor Day until October 24, 1944. The author refers to this regime in Chapter 13 and reprints the leading case dealing with it (*Duncan* v. *Kahanamoku*, 327 U.S. 304) almost in its entirety. The *Duncan* case and the author's discussion of martial law as such merit considerable study. Also the civil liability of military commanders operating martial law should come in for consideration. The military and naval commanders in Hawaii after Pearl Harbor are still being dogged by damage suits in the courts. The United States is still far behind the times in this respect. The British have a traditional policy of winding up a regime of martial law with an act of indemnity under which the Crown pays just claims against the military commanders. Our own generals and admirals are not so lucky; if they are unfortunate enough to be in command during a regime of martial law, they may as well look forward to a lifetime of litigation wherein their personal fortunes are at stake save only for the hope of congressional reimbursement. Congress reimbursed Andrew Jackson for a federal martial-law fine twenty-some years later and only a month or so before his death. Our author cites pertinent authorities on these questions and many others. It is safe to say no rival work in this field is likely to be undertaken in the near future.

WILLIAM J. HUGHES, JR.
Washington, D. C.

MILITARY TRIBUNALS AND INTERNATIONAL CRIMES. *By John Alan Appleman. Indianapolis: The Bobbs-Merrill Co., Inc. 1954. $8.00. Pages 436.*

With a reputation of considerable prominence as the author of well-known texts on insurance law and as a trial lawyer, Mr. Appleman turns his attention to the war crimes trials that followed World War II. These have produced a considerable literature of commentary, both approving and condemning them. Mr. Appleman tries to steer a middle course based on a factual examination. Implicit in his approach is the attitude: here is a body of law that has developed; as lawyers let us examine and evaluate it and while we are at it let us consider the criticisms that have been raised and ascertain whether they are well-founded.

He brings to this task a trial lawyer's point of view and examines in great detail the proceedings of the International Military Tribunal at Nuremberg, rightly regarding it as the foundation of the others. Having done that he discusses only the distinctive differences in other categories of trials: the subsequent Nuremberg trials held by the United States alone, the Tokyo trial before the International Military Tribunal for the Far East, and lastly the many trials by military commissions held by the United States in Germany and in the Pacific Theater as well as war crimes trials held by national courts of liberated nations. Of these last, which far overshadowed the Nuremberg trials in numbers, he estimates that there were at least 2116 trials, of which the United States held 950 involving 3095 defendants. In essence he concludes that the participants did a good job. The prosecution bore down; the defense counsel were diligent, pugnacious, persistent and sometimes brilliant; and the courts and their procedures, on the whole, were fair and they did a remarkable job under great handicaps.

Even if the procedures were fair, were the rules of substantive law equally so or were they only examples of "victor's justice"? It is in his extended analysis of the legal defenses interposed by the accused war criminals that the author makes his most valuable and original contribution. To the layman it may not seem that the wholesale slaughter of millions of civilians by the Nazis could rest upon any conceivable moral or legal justification. But a number of technical defenses were asserted (*e.g.*, no conspiracy, *ex post facto*, act of state, *respondeat superior*, acquiescence and equal guilt of other nations, validity under German law) and the rulings thereon were of great significance to the history of jurisprudence. Here, too, he believes that in general the rulings denying those defenses were sound. His principal misgivings concern the refusal to hear the plea that the Germans' war crimes were in reality only provoked by the Allies' own crimes. He believes that abstract justice required that this defense be heard, even if it hurt. The Nuremberg Tribunal rather reasonably ruled that the Germans were on trial, not the Allies.

Mr. Appleman is greatly impressed by what his page by page examination of the voluminous records reveals. He confesses in the Introduction:

> The author might add that in some cases his conclusions came as a surprise to him. He had approached this subject with somewhat of a preconceived notion against the validity of the trials. Any such feelings were, however, laid aside in order to report this material accurately. The author further believes that one should not purport to criticize any of the particular proceedings unless he has actually read the transcripts of evidence and has had some experience as a trial lawyer. These trials can be evaluated only upon the basis of study and not of prejudice.

As an introduction to the field, as an orientation for those concerned with the problems of United Nations proposals on genocide or human rights or on international criminal courts, the book is extremely useful for it provides a key to the literature and the reports on war crimes trials and has a valuable bibliography. The future policy implications may be drawn by others, but the legal basis for future decisions and trials is carefully, competently and interestingly set forth.

DAVID I. LIPPERT
Los Angeles, California

What's New in the Law

The current product of courts, departments and agencies

George Rossman • EDITOR-IN-CHARGE
Richard B. Allen • ASSISTANT

Attorneys . . . admission to Bar

■ The Supreme Court of Illinois has ruled that an otherwise qualified applicant may be denied admission to the Bar because of his refusal to say whether he was a member of the Communist Party or any other subversive organization listed by the United States Attorney General.

The applicant refused to answer the question before a district character and fitness committee which must approve applicants after they have passed the bar examination. Because of the refusal to answer, the committee reported adversely on him and he was denied the certificate of good moral character requisite for admission.

In affirming this action, the Court held that an inquiry into a bar applicant's loyalty was pertinent since one of the conditions precedent to practicing law in Illinois is the taking of an oath to support the United States and Illinois Constitutions. Considering that a lawyer holds "a position of public trust, or at least semipublic trust", the Court had no difficulty in determining that membership in the Party related to loyalty. A member of the Party may "be unable truthfully and in good conscience to take the oath...and it is relevant to inquire of an applicant as to his membership", the Court said.

The Court declared that if the applicant answered the question "no", the inquiry would end, unless the truth of the reply were doubted, in which case further questions would be proper. If the question were answered affirmatively, "further inquiry into the applicant's innocence or knowledge as to the subversive nature of the organization would be relevant".

The applicant contended that inquiries about his "political affiliations and organizational memberships" were unconstitutional derogations of his freedom-of-speech rights. But the Court had no trouble dismissing this argument.

The instant case reminded the Court of *In re Summers*, 325 U. S. 561, where the Supreme Court upheld Illinois' refusal to admit a conscientious objector to law practice. The Court opined that "one who would embrace a movement to overthrow our government by force of arms" is more unqualified to practice law than a conscientious objector.

(*In re Anastaplo*, Sup. Ct. Ill., September 23, 1954, Daily, J. 121 N.E. 2d 826.)

Attorneys . . . professional ethics

■ Applying Canon 6, the Court of Appeals for the Second Circuit has held that an attorney and any firm with which he is associated are disqualified from representing theater operators in a treble-damage antitrust suit against film distributors who were clients of a firm with which the attorney was formerly associated.

The attorney had been employed by a firm which had represented large motion picture distributors. He had personally participated in the defense of the group in three antitrust suits. Although he was only one of a team from the firm participating in the case, he had access to the distributors' papers for the purpose of collecting and correlating them for defense use.

The third paragraph of Canon 6 provides:

> The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed.

Although there was no finding that there was any specific information given the attorney by the former clients that might be used against them in the present case, the Court subscribed to the rule that disqualification should follow if there are matters embraced within the pending suit substantially related to the matters in the former case or cases. The Court held that such a situation existed in the instant case.

The attorney had spent about 80 per cent of his professional experience in the field of motion picture antitrust suits, and the Court said it was "not unmindful of the drastic effect of the canon" in this case. But, the Court remarked, the hardship "is an inevitable incident to his own choice of profession and choice of employment", and that the specialized practice "is but a small fragment of the overall field still open to him . . .".

The Court emphasized that its decision was no reflection on the attorney's good faith and moral integrity, inasmuch as he had relied on an informal agreement he had with a senior member of his former firm as to his future activities in the film antitrust field, which agreement the Court held was not binding.

(*Consolidated Theatres, Inc. et al.* v. *Warner Bros. Circuit Management Corporation*, C.A. 2d, September 28, 1954, Hincks, J.)

Constitutional Law . . . film censorship

■ Chicago's motion picture censorship machinery has been saved from a freedom-of-speech constitutional challenge by the Supreme Court of Illinois.

Under a city ordinance a motion picture must have a permit from the commissioner of police before it can be exhibited. The permit may be

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Editor's Note: **Virtually all the material mentioned in the above digests appears in the publications of the West Publishing Company or in The United States Law Week.**

withheld for a variety of reasons, including that the picture is "immoral or obscene", which was the ground used in the instant case for refusal of a permit for *The Miracle*. This is the same film whose banishment from New York as sacrilegious was reversed by the Supreme Court of the United States in *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495.

The *Burstyn* case is significant because it broke new ground in the field of motion picture censorship and licensing by holding that films are entitled to the protection of the First and Fourteenth Amendments the same as other forms of communication, and that they are entitled to be free of prior restraints. In *Burstyn* however, the Supreme Court left open a convenient door by reserving decision on the question "whether a state may censor motion pictures under a clearly drawn statute designed and applied to prevent the showing of obscene films".

Thus the Court in the instant case found that the Chicago censorship procedure squared with constitutional guarantees and that the meaning of "obscene" was clear. A motion picture is obscene, the Court declared, when, considered as a whole and with respect to its effect upon a normal, average person, "its calculated purpose or dominant effect is substantially to arouse sexual desires, and if the probability of this effect is so great as to outweigh whatever artistic or other merits the film may possess." And, the Court said, "immoral" is a synonym for "obscene".

The Court, while rejecting the exhibitors' contention that censorship is unconstitutional, did concede that upon a review of his action the censor must carry the burden of affirmatively showing that the film falls "within the proscriptive terms of the ordinance". The Court remanded the case for a determination by the trial judge as to whether the picture was obscene, since the trial court had ruled the ordinance unconstitutional and therefore had no occasion to make a finding as to obscenity.

(*American Civil Liberties Union et al.* v. *City of Chicago*, Sup. Ct. Ill., May 24, 1954, as modified on denial of rehearing September 20, 1954, Schaefer, C.J., 121 N.E. 2d 585.)

Courts . . . status of Tax Court

■ Although Congress in the Internal Revenue Code calls it "an independent agency in the executive branch of the Government", the Tax Court of the United States is a judicial agency and a court. This is the conclusion of the Court of Appeals for the Third Circuit in holding that the Tax Court should follow accepted forms of judicial procedure by indicating the names of judges who participate in *en banc* decisions.

The Court noted that Congress had designated the Tax Court as a court and its members as judges. Since its inception as the Board of Tax Appeals in 1924, the Court continued, it has operated only as a judicial tribunal, with powers wholly judicial in character, and it has never had any administrative powers or functions. Moreover, the Court observed, its decisions have been final and reviewable only on the record by the courts of appeals, and since 1948 the scope of review has been the same as cases from the district courts.

Hybrid or not, the Court declared, the "Tax Court is thus for all practical purposes a judicial tribunal operating in the federal judicial system". The Court said that whether it is a legislative court (like the Customs Court) or something else was a matter of "legal semantics" since it is not subject to supervision or review by the executive branch but only by federal appellate courts.

(*Stern et ux.* v. *Commissioner*, C.A. 3d, September 17, 1954, Maris, J).

Criminal Law. . .wire-tapped evidence

■ The Superior Court of Pennsylvania says that the subject of admitting evidence obtained by wire-tapping "encourages courts to divide, Congress and legislatures to debate, law reviews to philosophize and newspapers to editorialize—frequently and often vituperatively".

So remarking, the Court proceeded to divide six-to-one in reaffirming Pennsylvania's adherence to the rule that illegally obtained evidence is admissible and that the anti-wire-tapping provision of the Federal Communications Act [47 U.S.C.A. §605] does not deny to state courts the right to admit wire-tapped evidence.

In an excellent analysis of wire-tapping law, the Court pointed out that until 1914 all American jurisdictions except Iowa adhered to the rule that the admissibility of evidence was not affected by the illegality of the means by which it was obtained. In that year in *Weeks* v. *United States*, 232 U.S. 383, the Supreme Court held that evidence illegally obtained by federal officers was not admissible in federal courts. By 1949, the Court remarked, only sixteen states had adopted this rule.

After enactment of §605 of the Communication Act, the Supreme Court in *Nardone* v. *United States*, 302 U.S. 379, ruled that wire-tapped evidence was not admissible in federal courts. But in 1952 in *Schwartz* v. *Texas*, 344 U.S. 199, the Supreme Court said that §605 does not apply to exclude such evidence in state courts.

The defendant in the instant case conceded all this but came up with a novel theory. He argued that since §605 provides that "no person not being authorized by the sender shall intercept any communication and divulge or publish [it] . . .", a police officer who testifies in any court is actually committing a federal crime by divulging the wire-tapped conversation. So, he contended, regardless of the question of admissibility, no court would want to countenance the commission of a crime in its presence.

The Court emphatically rejected this contention. The Court stated that inasmuch as *Schwartz* held Section 605 not applicable to state officials testifying in state courts, it would be anomalous to hold that "Congress intended to make a crime of what it did not intend to prohibit". The Court declared, moreover, that the general words of the statute —"no person"—did not include the sovereign.

Adverting to Justice Holmes' remark that wire-tapping is "dirty business", the Court said: "Police officers cannot apprehend the enemies of society while carrying *The Age of Chivalry* in one hand and Emily Post's latest edition on *Etiquette* in the other."

(*Pennsylvania* v. *Chaitt,* Super. Ct. Pa., July 13, 1954, Woodside, J., 107 A. 2d 214.)

Divorce . . . domiciliary requirements

■ Facing the same problem that was before the Court of Appeals for the Third Circuit in *Alton* v. *Alton,* 207 F. 2d 667 (39 A.B.A.J. 1097; December, 1953), and deciding it differently, the Supreme Court of New Mexico has held that a statute providing a presumption of domicile for certain plaintiffs in divorce cases is not an unconstitutional interference with the judicial branch of government.

The statute provides that a member of the Armed Forces who has been "stationed continuously in any military base or installation in the State of New Mexico for [a] period of one (1) year shall...be deemed [a resident] in good faith of the state..." for the purpose of having the necessary residence requirement to commence a divorce suit. The statute withstood several constitutional attacks recently in *Wilson* v. *Wilson,* 272 P. 2d 319, but in the present case the Court went further, considering the contention that the statutory presumption of residence from mere presence was unconstitutional.

In the *Alton* case the Third Circuit was examining a Virgin Islands' statute making six weeks' presence in the Islands prima facie evidence of domicile for divorce purposes. A divided court struck down the law on due-process constitutional grounds. An appeal to the Supreme Court was dismissed as moot, 74 S. Ct. 736 (40 A.B.A.J. 709; August, 1954).

In reaching a different conclusion than the Third Circuit, the Court in the instant case made it clear that it was not ruling that domicile is not a prerequisite to divorce jurisdiction. Rather, the Court held that domicile is a prerequisite, but that a statute may provide a domiciliary presumption without unconstitutionally invading the province of the judiciary.

"There is a rational connection between the fact proved (one year continuously stationed in New Mexico)," the Court declared, "and the fact presumed (domiciliary intent). To reach this conclusion requires a step beyond the reasoning of any adjudicated cases called to our attention." The Court found justification for its position by reasoning that the existence of residence with domiciliary intent for divorce purposes has always centered upon the integrity of the plaintiff's assertion of its existence. The question of integrity has no place when a serviceman is involved, the Court said, since the military has absolute power to control the physical whereabouts of its members. Thus, the Court concluded, a serviceman is always residing in a certain place in good faith and not simply for the purpose of establishing residence for divorce.

(*Crownover* v. *Crownover,* Sup. Ct. N.M., September 9, 1954, Seymour, J., 274 P. 2d 127).

Divorce . . . foreign decree

■ An appraisal of how far the New York courts might go in not recognizing Mexican divorce decrees is made in a recent case in the United States District Court for the Southern District of New York.

Involved, for the purpose of determining whether a social security applicant was the widow of an insured decedent, was a 1927 Mexican divorce obtained by the widow's first husband. It was conceded that the husband had gone to Mexico solely for the purpose of obtaining a divorce and that he was not domiciled there. The wife had, however, appeared in the proceeding by duly authorized counsel.

The Court ruled that, however much New York courts might inquire into the jurisdictional status in regard to divorces granted by sister states, lack of domicile is not necessarily a bar in that state to the recognition of a foreign country's divorce. Observing that the present Mexican divorce was of neither the mail-order nor *ex parte* variety, the Court declared: "It is not offensive to the public policy of New York to recognize, despite the absence of the 'jurisdictional fact' of domicile, a foreign divorce obtained by parties who have taken the marital res out of the state for the purpose of invoking a divorcing jurisdiction, by the actual appearance of one of the parties coupled with the voluntary appearance of the other through authorized counsel."

(*Drew* v. *Hobby,* U.S. D.C. S.D. N.Y., July 19, 1954, Edelstein, J., 123 F. Supp. 245.)

Evidence . . . recording depositions

■ May a recording machine, rather than a stenographer, be employed for the taking of a pre-trial deposition, over the objection of the party being examined? A conflict on this question has developed in New York state.

The latest court to speak is the Supreme Court of Kings County, which has ruled that recording devices may not be used for examinations before trial if the party to be examined objects. The Court based its ruling on the state's rule of civil practice requiring examinations by depositions to be conducted "in the same manner as on a trial". This means the use of shorthand or stenotype reporters, the Court said, and nothing else.

In a previous case, *Gotthelf* v. *Hillcrest Lumber Co.,* 116 N.Y.S. 2d 873, the Appellate Division, First Department, had approved the use of a recording machine, over objection. There the Court held that the rule of civil practice meant only that the traditional question-and-answer form of examination should be used, and that it had no relation to the mechanics of recording the testimony.

(*Gelman* v. *Pepper et al.,* N.Y. Sup. Ct., Kings County, April 26, 1954, Moss, J., 132 N.Y.S. 2d 460.)

Fair Trade Laws . . . effect of decree

■ A corporation which has signed a fair trade agreement in accordance

with the laws of a state in which it operates cannot escape the consequences of violating the agreement by the expedient of its officers organizing a discount-selling corporation in a non-fair trade jurisdiction and soliciting business by mail in the fair trade state, according to the United States District Court for the Southern District of New York.

After having signed a fair trade agreement under New York's Feld-Crawford Act in 1950, the defendant was charged the same year with violation of the agreement. By consent of the parties, a decree enjoining further violations was entered. In 1953 the defendant was found in contempt of the order, at which time it represented to the court that "it will respect and abide by said injunctive order [of 1950] of this court".

In 1954 the principals of the defendant organized a discount mail order corporation in the District of Columbia, which has no fair trade laws. Officers and stock ownership of the two companies were the same. The discount company solicited orders by mail in New York, offering to sell the plaintiff's products at less than the fair-trade price. The offended manufacturer asked for another contempt order.

The defendant argued that the discount company was a legitimate concern having no connection with the defendant and that the Court's injunction could not extend to interstate commerce. The Court, however, rejected this contention, and declared that the essential question was not the defendant's right to organize and operate a discount company in a non-fair trade state and ship into a fair trade state, but was whether the new corporation was being used as a means of circumventing the Court's injunction. "In other words," the Court asked, "was a lawful activity used to achieve an illegal objective?"

But the Court felt that it could not decide the contempt question posed without further information as to whether sales fell into a pattern indicating defiance of the order, and it appointed a special master to take evidence.

(*Sunbeam Corporation* v. *Masters, Inc.*, U.S. D.C. S.D. N.Y., August 21, 1954, Weinfeld, J.)

Federal Tort Claims Act . . . servicemen

■ A soldier's negligent injury of another while on "a frolic of his own" does not attach liability to the United States under the Federal Tort Claims Act, even though it is argued that the soldier was seeking entertainment to bolster his morale, according to the Court of Appeals for the Ninth Circuit.

The plaintiff was injured when the car in which she was sitting was struck by an Army weapons carrier driven by a soldier who had been drinking and who had obtained the vehicle by use of a spurious trip ticket. Use of the vehicle was unauthorized and was unconnected with any duties of the soldier.

Nevertheless, the plaintiff argued, the case came within *Murphey* v. *U.S.*, 179 F. 2d 743. In that case the Ninth Circuit held the Government liable under the Act where a serviceman was allowed to take an Army truck under specific authorization that it might be used to carry soldiers to town for "entertainment, movies, etc." and the accident occurred at an Indian dance outside the town.

In distinguishing the cases, the Court noted that in *Murphey* the authorization to use the truck for "entertainment, movies, etc." included a digression to the Indian dance. In the instant case, the Court pointed out, there was no authority to use the truck and it was not being used for organized recreational purposes. The Court also rejected the argument that the soldier's joy ride was in the line of "military duty" since entertainment is essential to a soldier's morale.

(*Williams* v. *U.S.*, C.A. 9th, September 8, 1954, Bone, J.)

Juries . . . outside influences

■ Trial lawyers know that it is next to impossible to insulate a jury from persistent corridor rumors during the trial of a case. A recent case in the Court of Appeals for the Fifth Circuit illuminates what consequences may follow if it can be proved that a jury did hear and discuss rumors about a compromise settlement.

The case was a treble-damage action by theater owners against a group of motion picture distributors in which a conspiracy to restrict runs and clearances was alleged. It was tried to a jury intermittently over a period of seven months. After a verdict and judgment against them, the distributors sought a new trial on several grounds, one of which was that the jury had been influenced by prejudicial and extraneous information.

At a hearing on the motion, all the jurors were questioned. It developed that it had been a rather common rumor during the trial, discussed by the jurors, that one of the defendants had settled the case out of court for $75,000 to $100,000. As a matter of fact one of the defendants had settled during the trial for $10,000. It also turned out that one of the plaintiffs' witnesses was the father of a juror's brother-in-law and that the juror and the witness had discussed the case.

The Court concluded that "the record as a whole justifies the conclusion these extraneous matters had a substantial influence, prejudicial to defendants, in producing the verdict in this case".

(*Paramount Film Distributing Corporation et al.* v. *Applebaum et al.*, C.A. 5th, October 12, 1954, Dawkins, J.)

Process . . . substituted service

■ A Louisiana statute permitting substituted service upon the secretary of state in actions against nonresident owners or operators of water craft for accidents upon navigable waters within the state has been held constitutional by the United States District Court for the Western District of Louisiana.

The statute was patterned after an act permitting service upon the secretary of state in actions involving nonresident motorists, which Louisiana has in common with many other states.

The defendants argued that the hazards of motor highway travel justified and, in fact, compelled the exercise by the states of their police power to insure safety for all highway users by providing for substituted service, but that no such considerations exist in the operation of watercraft.

The Court disagreed. It was a matter of difference of degree and not substance, it ruled, observing that navigation accidents may be as serious, although not as numerous, as highway accidents. "The states have a wide discretion to determine when and in what circumstances they will exercise their police power," the Court concluded, "and the courts will not interfere except in cases of clear and arbitrary abuse".

(*Goltzman et al.* v. *Rougeot et al.*, U.S. D.C. W.D. La., August 2, 1954, Dawkins, J., 122 F. Supp. 700.)

Taxation . . . transferred assets

■ An attempt by the Commissioner to collect unpaid income taxes of a decedent-insured from either the proceeds of his life insurance or its cash value at the time of his death has been rejected by the Court of Appeals for the Second Circuit.

The decedent died with life insurance of the face amount of $42,000 payable to his wife and children and as to which he had retained the right to change the beneficiary. The cash surrender value of the policies at the time of his death was $3,109.80. The decedent's estate was negligible and subject to a tax liability of $401,507.56 in income taxes for the years 1929 to 1938.

The Commissioner contended that under I.R.C. Section 311 [Section 6901 of the 1954 Code] the insurance proceeds were "transferred assets" in the hands of the beneficiaries subject to liability for payment of the decedent's taxes. The Court did not agree. It ruled that under Section 311 the person against whom the collection is attempted must be a "transferee" and must also be under a "liability, at law or in equity" for the debt.

The Court then ruled that the beneficiaries were transferees only to the extent of the cash value of the policies, and not to the proceeds. But under applicable New York law, the Court continued, even the cash value could not be subjected to liability in the absence of a showing of actual fraud on the part of the decedent-insured to defraud creditors at the time he took out the policies.

(*Rowen et al.* v. *Commissioner*, C. A. 2d, September 9, 1954, Hincks, J.)

Unfair Competition . . . charge plates

■ The Court of Appeals for the Second Circuit has held that the issuer of metal charge plates cannot prevent use of the plates in a store not a member of the association which has issued the plates.

The charge plates in question were the ordinary small tin plates embossed with the customer's name which are in general use throughout the nation. Six stores had formed an association and had agreed to extend credit to the charge plate holders. A non-member store, turned down in its bid for membership in the association, allowed its customers credit upon presentation of the plates. The association sought an injunction for unfair competition.

The Court ruled that the plates had been unconditionally distributed to the public and that the association could not impose a servitude or restriction upon their use. The Court said "If defendant wants to make short cuts in its bookkeeping, to its own advantage, by using what has been freely distributed to the general public, there seems neither legal nor equitable basis for finding that it has done wrong, any more than had it copied names and addresses from a telephone directory, for example."

Finding no exact precedent, the Court refused to draw an analogy to *International News Service* v. *Associated Press*, 248 U. S. 215, which involved misappropriation and sale by I.N.S. of news gathered by the A.P. In the present case, the Court declared, while there might be competition among the defendant and the association stores, the defendant was not appropriating and selling as its own the products sold by the other stores.

(*Hartford Charga-Plate Associates, Inc.* v. *Youth Centre-Cinderella Stores, Inc.*, C. A.. 2d, September 17, 1954, Clark, J.)

What's Happened Since . . .

■ On October 14, 1954, the Supreme Court of the United States:

DENIED CERTIORARI in *Tudor* v. *Board of Education*, 100 A. 2d 857 (40 A.B.A.J. 324; April, 1954), leaving in effect the decision of the Supreme Court of New Jersey that the King James Version of the New Testament is sectarian and that distribution of it in the state's public school system violates constitutional provisions relating to freedom of religion.

■ On October 18, 1954, the Supreme Court of the United States:

DENIED CERTIORARI in *Bertelsen* v. *Cooney*, 213 F. 2d 161 (40 A.B.A.J. 705; August, 1954), leaving in effect the decision of the Court of Appeals for the Fifth Circuit that the doctors' draft law is not unconstitutional as violating the war powers and the Fifth and Thirteenth Amendments.

DENIED CERTIORARI in *Rogers* v. *Republic Pictures Corporation* and *Autry* v. *Republic Productions, Inc.*, 213 F. 2d 662 and 213 F. 2d 667 (40 A.B.A.J. 783; September, 1954), leaving in effect the decisions of the Court of Appeals for the Ninth Circuit that under contracts with motion picture producers actors had relinquished rights to films and the producers could license them for showing on commercially sponsored TV programs, and in the *Autry* case could permit them to be cut to fifty-three minutes running time.

Department of Legislation

Charles B. Nutting, Editor-in-Charge

■ School law is a little known but highly significant segment of the total body of legislation. Recent efforts toward its codification are embodied in the bulletin of the National Education Association which is reviewed in the following article by Dr. William A. Yeager, a nationally known authority in the field.

The Codification of School Laws—A Review[1]

William A. Yeager, Professor of Education, Director of Courses in School Administration at the University of Pittsburgh

■ Largely because the Federal Constitution of the United States is silent in regard to education matters, education has been declared a state function. This has been confirmed in educational practice and by numerous court decisions. The constitutions of all of the states contain provisions which make it obligatory upon their legislatures to provide for the establishment of efficient and uniform systems of public schools. As an outcome all state statutory provisions relating to education are passed in obedience to those constitutional mandates. Within certain exceptions state legislatures have plenary power in educational matters within the state, limited only by the state constitution and by such broad educational interpretations as have been made by the United States Supreme Court.[2] Such plenary power may be said to be an attribute of sovereignty within the state. It may be derived from the power of the state to promote the general welfare of its citizenry; it may also be attributed to the state's police power.

Even the most casual observer may realize the magnitude and complexity of state laws relating to education that have arisen in the forty-eight states over a century or more in some states, and decades in others, of their legal existence as states. Each state has its own unique educational history, problems and educational needs. Each state over the years has endeavored to meet these needs in accordance with prevailing public opinion expressed in legislation and in the light of changing social and economic conditions. The result has been a wide variety of patterns in the school laws of our states. Many school codes are not organized under logical headings. They are not fully indexed and contain unnecessary duplications and ambiguities. In some states there is a lack of cross reference between the school laws and the legal provisions affecting schools which are to be found in the general statutes.

Realizing the need for greater uniformity and understanding of the school laws of the several states, the National Education Association undertook to analyze the school laws of the several states with a view to establishing greater uniformity in the basic principles of codification. In addition to the expert staff of the NEA Research Division, lawyers, chief state school officers, codifiers and college professors were invited to assist in the huge task of compilation.

The term "code" in a technical sense means a collection of statutes existing and in force in a given state arranged systematically in one book under some plan of classification. Since new laws are passed annually in some states and biennially in others, complete revision is hardly possible in each state after each legislative session. New codes may be issued at intervals, often quite infrequently. Thus it may be difficult to ascertain laws that are redundant, obsolete, overlapping and conflicting. Moreover, of greater significance is the absence of any uniformity in comparing the laws of one state with another because of differences in classification and other factors.

After reviewing practices and principles in the codification of general statutes, certain standards were agreed upon as desirable considerations in the preparation of any new codification. These are as follows:

1. The system of classification of statutory provisions should be logical.

2. The classification of provisions within a title should be assigned "catchline" headings in about four levels of subdivision.

3. Major topics within the title should have equal significance.

4. The numbering system should be planned so as to provide identification, exact reference and permanence with possibility of expansion.
   a. Each section should have a number that is distinctive and identifiable with subject matter.
   b. The same numbers should be retained after legislative changes.
   c. New provisions should be inserted at their logical places without disturbing the numbering system.

5. The compilation should permit continuous revision to keep it up to date.

6. Frontal analyses should be included but held to a reasonable degree of detail.

7. Reference helps should be included but in such a way as not to interfere with continuity of statutory provisions.

8. A good index is essential.

After a discussion of these standards, the current publications of the general statutes regarding schools in all forty-eight states were described

1. National Education Association, Research Division: "The Codification of School Law", *Research Bulletin*, Washington, The Association (February, 1954).

2. For example, the celebrated case of *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510; 45 S. Ct. 571.

and evaluated in terms of these standards. It was found that variation from state to state is great. While many of the states meet all of the above standards to a substantial extent, some states meet none of them adequately.

In reviewing the tables describing the current publications on general statutes, such wide variations as the following were noted:

(1) No state uses exactly the same designated title for its publications.

(2) The number of volumes ranges from one to seventy-two (New Jersey) and ninety-five (New York).

(3) Dates of publication range from 1929 to 1953.

(4) Methods of keeping publications up to date include (a) supplementary volume, (b) pocket part, (c) loose leaf, (d) no provision.

(5) It is difficult to locate school laws in the general statutes because of (a) the large number of titles, and (b) the large number of chapters within titles.

(6) The number of titles referring specifically to education varies widely.

(7) Indexes vary as to completeness, logic of grouping and identification of key words.

(8) While some form of reference helps appear universally used, there is little uniformity in regard to them.

The bulletin then proposes a suggested outline for a state school code. This follows:

Chapter 1. General Provisions
Chapter 2. General Administration
Chapter 3. School District Organization
Chapter 4. Finance
Chapter 5. Property
Chapter 6. Employees
Chapter 7. Pupils
Chapter 8. Transportation
Chapter 9. Instruction
Chapter 10. Public Institutions of Higher Learning
Chapter 11. Institutional Schools
Chapter 12. Parochial and Private Schools
Cross References to Constitutional Provisions on Education.

These general headings are in turn broken down into sub-divisions with a key-numbering system attached for ready reference. Each chapter is composed of at least two articles; each article is composed of sections. Details of statutory provisions would be placed in these sections or be further sub-divided into sub-sections. In the numbering system "T" represents the title number which always remains uniform for the section or sub-section designated. The number to the right of the colon identifies the topics with chapters and articles. The number to the extreme right refers to sections; the number to the extreme left refers to chapters; the middle number refers to articles. In this manner, designations become uniform and cross references and comparisons are easily made as between states.

In order to illustrate the manner of classification within chapters, Chapter 3 above has been selected:

CHAPTER 3. SCHOOL DISTRICT ORGANIZATION
Article 1. Classification of School Districts
T: 311 Classes of school districts
T: 312 Reclassification of school districts
T: 313 Unorganized territory
Article 2. Reorganization of Districts
T: 321 Dissolution and re-creation
T: 322 Annexation
T: 323 Merger of whole districts
T: 324 Boundary adjustments
T: 325 Other reorganizations
Article 3. Consolidation of Attendance Units Within a Single District
T: 331 Consolidation of attendance within a single district

This bulletin with its pioneer suggestions is designed to be helpful to codifiers of school laws and especially to the state department of education within the several states. It should be helpful to a state education association, a legislator or other person or group preparing proposals for legislation. It should stimulate states to proceed with re-codification of their school laws. To quote the Bulletin "It is a pioneer study that may have little immediate effect, but may exert considerable influence gradually over the years."

In closing, much has been done in recent years to create a better understanding in regard to school law. Several textbooks have appeared and are widely used. The *Yearbook of School Law* has served this useful field annually for many years. University courses in school law are now generally a part of the educational preparation of all school administrators. Research in school law is now a characteristic aspect of educational research in many universities. Of recent interest is the School Law Conference sponsored jointly by CPEA and Duke University. All of these developments point to an earnest effort to establish the educational program of the public schools on a sound legal basis.

OUR YOUNGER LAWYERS

Thomas G. Meeker, Secretary and Editor-in-Charge, New Haven, Conn.

Conference Action at Chicago

■ Approximately 125 members of the Conference participated in the deliberations of the Twenty-First Annual Meeting of the Junior Bar Conference at the LaSalle Hotel on August 14 and 15, 1954. The Executive Council and the Conference, at its second general session considered a variety of proposals, too numerous to report in full. Here are some of the highlights of the Conference's deliberations:

Voted to establish September, 1954, as "New Admittees Membership Month" and instructed the Professional Director to coordinate the Membership Committee and the Law Students Committee in the fullest possible way to obtain membership applications from newly admitted attorneys.

Voted that the Conference go on record as supporting the Administrative Practitioner's and Ethics Bill as approved by the Administrative Law Section of the Association.

Voted to continue the month of March, 1955, as "Membership Month" in the Conference.

Voted that all committees of the Conference be staffed by the National Chairman, and committees other than special committees be staffed by the appointment of either four individuals in a state, one to serve on the committees of each of the four Directors, or of an individual in each state to serve as a member of each national committee, as the state chairman may decide, provided that if no decision is communicated by the state chairman to his Council member and by that Council member communicated to the Vice Chairman, then the Vice Chairman shall decide on staffing of the Committees in such state or states, provided that the National Chairman may authorize and make additional appointments of members of committees at such times on such bases as he may deem best.

Approved the appointment by the Chairman of a special committee to cooperate with the Association's Committee on the Administration of Criminal Justice.

Empowered the Chairman to promptly appoint a special committee to discuss plans for the most effective use by the Conference of the room in the American Bar Center donated by the Beneficial Loan Corporation, directing the Committee to report at the Mid-winter meeting of the Council.

Voted to change the By-laws to require nominating petitions for Council representatives to the same extent as for officers, provided, however, that only five signatures be required on such petitions, the form of such amendment to be that adopted by the Council at its next Midyear Meeting after consideration of a draft to be prepared by the By-laws Committee.

Approved the implementation of a citizenship program to be effected under the Director of Information by the Public Information Committee, in cooperation with the Standing Committee on Citizenship of the Association.

Directed the Minor Courts Committee to conduct a critical appraisal of minor courts in the several states and to file a written report with the Conference on changes and progressive steps being taken in the states in connection with the improvement of the administration of minor courts.

Approved the publication by the Lawyer Reference Committee of a one-page *Monthly Lawyer Referral Service Bulletin.*

Membership Campaign Still Rolling

Membership Chairman Thomas E. Taulbee, of Wilmington, Delaware, reports that Director of Personnel, S. Michael Schatz, of Hartford, Connecticut, returned from the Annual Meeting and obtained twenty-five new members for the American Bar Association—a Conference record. Mr. Taulbee also reports that William J. Fuchs, of Philadelphia, Pennsylvania, has just finished writing 200 recently admitted lawyers in Pennsylvania, advising them of the advantages of joining the Association and soliciting their membership. The Junior Bar Section of California accounted for fifty-nine new members in the month of August alone. Chairman Taulbee thinks that the Conference will have obtained a total of 1800 new members this year, as contrasted with a total number of 796 for the calendar year 1953. It is not too late to help put the Conference over the top. All Conference members are urged to try to obtain one new member during the months of November and December.

New Units Affiliated

At the Annual Meeting in Chicago the Executive Council voted to affiliate two organizations of young lawyers, the Junior Bar Section of the North Carolina Bar Association and the Las Vegas Young Lawyers Club of Nevada. Officers of the Junior Bar Section in North Carolina are as follows: Chairman, Charles F. Blanchard, Raleigh; Vice Chairman, Richard L. Wharton, Jr., Greensboro; Secretary-Treasurer, Don T. Evans, Rocky Mount; Chairman of Executive Council, W. L. Thorp, Rocky Mount. John F. Mendozo, of Las Vegas, is President of the Las Vegas Young Lawyers Club of Nevada, which is also affiliated with the Clark County Bar Association of Nevada. Franklin Rittenhouse, of Las Vegas, is Secretary.

Jones Elected Section Delegate

Chairman C. Baxter Jones, Jr., of Atlanta, Georgia, was elected Section Delegate to the House of Delegates to succeed Richard H. Bowerman, who resigned during the Annual Meeting.

Retiring 1954 officers and Council, from left to right: (First row) Miss Rosemary Scott, Councilman from the Sixth Circuit; Richard H. Bowerman, Immediate Past Chairman and Section Delegate to the House of Delegates; Vice Chairman, Stanley B. Balbach and Chairman-Elect for 1955; Chairman C. Baxter Jones, Jr.; Secretary Thomas G. Meeker and Secretary-Elect for 1955; Frank L. Hinckley, Jr., Councilman from the First Circuit.
Second row, from left to right: C. Frank Reifsnyder, Councilman from the District of Columbia; C. Severin Buschmann, Jr., Councilman from the Seventh Circuit; Ray R. Christensen, Councilman-at-Large from the Ninth and Tenth Circuits; F. Hastings Griffin, Jr., Councilman from the Third Circuit; Alvin B. Rubin, Councilman from the Fifth and Eighth Circuits-at-Large; Morgan P. Ames, Councilman from the Second Circuit and newly appointed Service Director for 1955; Frank E. Horka, Information Director; Robert L. Meyer, Councilman from the Ninth Circuit; Augustine T. Smythe, Jr., Councilman from the Fourth Circuit; S. Michael Schatz, Personnel Director and Councilman-Elect from the Second Circuit; Robert G. Nichols, Jr., Councilman from the Fifth Circuit; and Charles F. Malone, Councilman from the Tenth Circuit. John R. Baylor, Retiring Councilman from the Eighth Circuit, is not shown in the picture.

Allegheny Applies for Affiliation

James M. McElfish, of Pittsburgh, Pennsylvania, Chairman of the Junior Bar Section of the Allegheny County Bar Association, filed an application for affiliation with the Junior Bar Conference of the American Bar Association on September 1, 1954. This Section is organized under the Allegheny County Bar Association of Pennsylvania. The other officers of the Section are as follows: Vice Chairman, John P. Davis, Jr.; Secretary; Thomas D. Thomson; Treasurer, Knox Brown, all of Pittsburgh, Pennsylvania. The application will be considered at the Mid-Winter Meeting of the Conference in Chicago.

1955 Organization Nears Completion

Immediately after the Annual Meeting in Chicago, Chairman-Elect Stanley B. Balbach of Urbana, Illinois, met with Vice Chairman-Elect Robert G. Storey, Jr., of Dallas, Texas, and Secretary Thomas G. Meeker, Washington, D. C., to make plans for Committee appointments and activity during 1955. Chairman-Elect Balbach has completed his appointment of national committee chairmen and these appointments will be published later. During the period since the Annual Meeting the Directors selected for 1955 have communicated with the committee chairmen whose activities they will supervise during the coming year. Plans for individual committee activity have been formulated.

Chairman-Elect Balbach has outlined a travel schedule in an effort to stimulate interest and activity in the Conference. On November 5, he presented the Award of Merit to State Groups to the Young Lawyers Section of the Georgia Bar Association and immediately thereafter he met with representatives of the Alabama Junior Bar in Birmingham, Alabama. Following that meeting he went to Jonesboro, Arkansas, to meet with representatives of the Arkansas Junior Bar. On November 10, he presented the Award of Merit for Local Groups to the Junior Bar of Milwaukee, Wisconsin. His future plans include a visit to Junior Bar groups in the West, including Montana, North Dakota, South Dakota, Wyoming, Idaho, Colorado and Nebraska.

Vice Chairman-Elect Robert G. Storey, Jr., will represent the officers of the Conference at the Phoenix Regional Meeting, and he contemplates visits to California, Nevada, Utah and New Mexico.

Secretary Meeker will represent the Conference at the Cincinnati Regional Meeting.

Tax Notes

■ **Prepared by Committee on Publications, Section of Taxation, John W. Ervin, Chairman.**

When Are Lawyers' Fees and Legal Expenses Deductible?

■ All lawyers, for obvious reasons, are interested in the question whether legal and litigation expenses are deductible by their clients for tax purposes. There has been considerable uncertainty in this area of tax law although the Supreme Court decisions have often been favorable.

The Supreme Court in *Kornhauser* v. *United States,* 276 U. S. 145 (1928), held that legal fees in defending a suit for an accounting by a former business partner were deductible. In *Commissioner* v. *Heininger,* 320 U. S. 467 (1943), the Supreme Court decided that legal fees incurred by a taxpayer in the mail order business to obtain an injunction against a Post Office fraud order were deductible. And, in *Bingham Trust* v. *Commissioner,* 325 U. S 367 (1945), the Supreme Court determined that legal fees incurred partly in contesting an income tax deficiency against a trust and partly in winding up the trust were deductible.

Nevertheless, deduction of such expenses is frequently disallowed on one or more of the following grounds: (1) they are "capital expenditures" to acquire or protect title to property; (2) they are not "ordinary and necessary" business expenses (or non-business expenses in connection with income production or income producing property); or (3) they are "personal" expenses. Some recent cases indicate an encouraging tendency to increase the area in which deduction will be allowed.

In *Urquhart* v. *Commissioner,* 215 F. 2d 17 (3d Cir., 1954), the "capital expenditure" concept has been sensibly limited. Two individuals were joint venturers engaged in developing and licensing patents, and they held two patents on a fire extinguisher. They sued a customer of a manufacturer of extinguishers for patent infringement. The manufacturer countered with a suit for a declaratory judgment to declare the patents invalid; the taxpayers promptly counterclaimed for an injunction against infringement, an accounting for profits and treble damages. Judgment was entered for the manufacturer in both actions. The Tax Court held that the taxpayers' legal fees were non-deductible capital expenditures because incurred in defending a property interest, the *exclusive* right to make, use, and vend the inventions granted by the patents; the taxpayers were only "incidentally" engaged in seeking to collect income. *George Gordon & Mary Urquhart,* 20 T.C. 944 (1953).

The Third Circuit reversed, holding that the expenses were ordinary and necessary business expenses because directly connected with and proximately resulting from the conduct of taxpayer's business of exploiting and licensing patents. It was unimportant that taxpayers were unsuccessful in the litigation, and the expenses need not have been incurred in the production of income or be actually productive of income. The court considered the litigation to be "commonplace patent infringement litigation . . . a far cry from removing a cloud on title or defending ownership of property".

The "ordinary and necessary" concept was given broader meaning in *Standard Galvanizing Co.* v. *Commissioner,* 202 F. 2d 736 (7th Cir. 1953). The taxpayer corporation had instructed its president to procure loans necessary to avoid bankruptcy, and the president did so, pledging his stock as security in the form of an outright transfer to the lender. The lender later sued to compel transfer on the corporation books, claiming ownership of the stock. The president won the suit, incurring $21,500 of legal fees which were paid by the corporation. The Tax Court allowed the corporation to deduct only $5,000 as the portion of the fees allocable to services rendered the corporation in protection of its own interests; the Court indicated that since the actions of the president had been authorized by the corporation and were for the corporation's benefit, the corporation had *some* liability. However, the balance of the fee was considered by the Court to represent payment for services rendered to the president personally to protect him against his own negligence in not transferring the stock expressly as a pledge. Under this view of the facts, the corporation had no obligation to pay this part of the fee, so the Court did not consider that expenditure was "ordinary and necessary".

The Seventh Circuit, taking a broader view of the business practicalities of the situation, reversed and allowed a deduction of the full $21,500. There was at least an implied agreement by the corporation to save the the president from financial loss for doing what he was told to do. The corporation had good reason to expect that it would be sued by the president; that it might lose; and that even if it won the litigation would be expensive. It had reasonable grounds for believing it was in the best interests of the business to incur the legal expense to defend the president's interest; the entire expenditure was therefore an ordinary and necessary business expense.

Similarly, the "personal expense" limitation with regard to legal fees was held inapplicable in *Northern Trust Co., Trustee,* 211 F. 2d 251

(5th Cir. 1954). In that case, the taxpayer was the remainderman of an inter vivos trust created by his father. He received the trust property on the death of his mother, the life beneficiary. After the father's death, the Government asserted a claim for additional estate taxes against taxpayer as transferee on the ground that the inter vivos trust was a transfer taking effect upon the settlor's death, includable in the father's gross estate. The taxpayer successfully resisted the Government's claim, but the Commissioner of Internal Revenue disallowed taxpayer's deduction of the legal fees incurred in connection therewith. The Commissioner contended that such fees were personal expenses because a transferee is personally liable for any estate tax deficiency. The Fifth Circuit held, however, that the fees were ordinary and necessary expenses for the conservation of property held for the production of income, the trust property. "It is not the personal liability but rather the nature of the expense itself, and the proximate relation to income producing property of the taxpayer..." which determines whether the expense is deductible or a non-deductible personal expense.

Even though legal expenses are partly "capital" or "personal" in nature, a deduction may be allowed for any portion allocable to the business or income aspects of the matter. Thus, in *Commissioner* v. *Coke*, 201 F. 2d 742 (5th Cir., 1953), the Court approved an allocation by the Tax Court where the legal fees had been incurred to recover certain community property erroneously treated as separate property in a divorce settlement. The action had been settled on the ground that the property was community property of which the taxpayer owned one half and that the property should be sold and the proceeds divided. The taxpayer received $246,500 as her share of the proceeds and her original cost basis was $61,500. The Tax Court treated 61500/246500 of the legal fees as allocable to the recovery of capital, and the balance was held deductible as incurred in the production or collection of income.

In *Virginia Hansen Vincent*, 18 T.C. 339 (1952), an allocation was approved even though the *primary* purpose of the suit was to establish title to property. However, in *Midco Oil Corporation*, 20 T.C. 587 (1953), the Tax Court refused to allow an allocation where the "major purpose" of the action related to ownership of property, and the question of accounting for profits was only "corollary". Five judges strongly dissented on the ground of clear inconsistency with the *Vincent* decision, and the case may be simply a "maverick" decision.

Lawyers will render a service to clients by allocating fees on statements to the major phases of the litigation where any question as to the deductible character of the expense exists, particularly where the segregation is supportable on the basis of time charges.

Legal fees in connection with tax matters were previously deductible by individuals where related to income taxes but not where related to gift taxes. In *Hymie Schwartz*, 22 T.C.—No. 91 (1954), the Tax Court allowed a full deduction for legal fees in contesting and settling income tax liabilities. The Commissioner had treated the fees as personal expenses because additions to the tax for fraud and a possible charge of criminal fraud were involved; it was argued that public policy should preclude the deduction. The taxpayer was actually later indicted and convicted of criminal fraud, and his civil liability as finally settled included fraud penalties. The Tax Court, however, decided that the fees in question were for services not performed in connection with the fraud aspects, but purely in connection with the determination of the business income of the taxpayer; the Court was primarily impressed by the fact that the services terminated before the fraud penalties had been imposed and before an indictment had been returned. Five judges dissented.

Section 212 of the Internal Revenue Code of 1954 specifically provides that an individual may deduct ordinary and necessary expenses in connection with the determination, collection or refund of any tax. The Committee reports state that the new law is designed to permit deduction by an individual of legal and other expenses in connection with a *contested* tax liability regardless of the type of tax or taxing authority. The statute, however, does not contain the "contest" limitation, and the new section may be broad enough to cover legal fees for any kind of tax advice. Certainly Congress did not intend to withdraw the privilege of deducting fees paid for the preparation of income tax and other returns. The reports must be read as simply discussing one area of application of the statute; this does not imply that the statute is inapplicable in other areas.

Contributed by Committee Member John F. Nolan.

(Continued from Page 1076)

be noted, upheld a conviction. On the matter of proof, the Court of Appeals for the District of Columbia Circuit has stated that pertinency "is not a personal privilege, such as the right to refrain from self-incrimination, which is waived if not seasonably asserted". It also stated that "when a question is not in itself or because of its context plainly pertinent, the United States must somehow show its pertinency to the court".[45]

Judicial influence also comes from the empirical process of applying the interpretation of "pertinency" to particular situations. In two such instances, the decisions were favorable to the witness. In *Rumely*,[46] the Supreme Court held that an authorization to study "lobbying activities" did not permit a request for names of persons who paid the "Committee for Constitutional Government" for the general distribution of books. In *Bowers*,[47] the Court of Appeals for the District of Columbia Circuit held various questions not pertinent to an investigation of organized crime. These included the nature of the witness' business twenty-four years previously, where he had earned $5,000 which he invested in a restaurant, and whether he knew a certain named person. The opinion expresses doubt whether "Do-you-know-a-certain-person" can ever be said to be pertinent and suggests that the committee may have been accusing the witness of "guilt through casual acquaintance".[48]

The few limitations imposed by the statute and the case law interpreting its provisions probably have made committee procedures somewhat more regular and predictable, but the extent of judicial influence necessarily is limited. Court cases concern only particular witnesses, and the interrogation in dispute usually is viewed in terms of the objective rather than the accomplishments of the committee. Moreover, the courts prefer to leave the conduct of investigations and hearings largely to congressional discretion.[49] The rules of the respective houses and the various committees tend to regularize some of the operations but much rests with individual discretion.[50] The Supreme Court has held a proceeding invalid for lack of a quorum.[51] The operating problem thus created has been met by authorizing small sub-committees. One-man hearings have been common and their tendency to highlight individual proclivities has led to intermittent criticism.[52]

Congressional hearings usually suffer in a comparison with courtroom procedures. On that basis the spectacular exposure hearings have been censured,[53] and one district judge pioneered a precedent in holding that crowds and television and camera apparatus in the hearing room justified a refusal to testify.[54] The Court of Appeals for the District of Columbia Circuit made courtroom procedure a basis for upholding the conviction of a witness who left in the midst of a hearing, pointing out that in a courtroom an "embarrassed and irritated" witness may not leave because he does not understand the purpose of cross-examination.[55] It also brought out that investigative questioning may be even broader. A judicial proceeding relates to a single case and evidence is admissible only within the "narrow limits of the pleadings" whereas "a legislative inquiry anticipates *all possible cases*" and the admissible evidence is comparably extensive. In a 1952 opinion,[56] the same Court acknowledged that the legislative hearing, unlike the court trial, does not provide for a "prompt authoritative ruling" upon the propriety of a question with an opportunity for the witness "to recanvas his position in the light of the ruling". Corrective measures, it stated however, are for Congress.

By way of summary, the scope of the investigating power is markedly broad in both theory and practice. The wide statement of the power in

45. *Bowers* v. *United States*, 202 F. 2d 447 at 452, 453 (D.C. Cir. 1953).

46. *United States* v. *Rumely*, 345 U.S. 41 at 47, 73 S. Ct. 543, 97 L. ed. 770 (1953). Similarly, *United States* v. *Patterson*, 206 F. 2d 433 (D.C. Cir. 1953) concerning request for documents of Civil Rights Congress relating to its organization, its finance, and its activities pertaining to legislation.

47. *Bowers* v. *United States*, 202 F. 2d 447 at 450, 451, 452 (D.C. Cir. 1953).

48. *Id.* at 452. The same court in another case held that a request for the witness' name before it had been changed some fifteen years previously was not improper in an inquiry into subversive activities. The witness had abandoned the defense of no pertinency at oral argument, and the court viewed the refusal as without any asserted justification. *Bart* v. *United States*, 203 F. 2d 45 at 47 (D.C. Cir. 1952).

49. " . . . the public functionaries must be left at liberty to exercise the powers which the people have intrusted to them." *Anderson* v. *Dunn*, 6 Wheat. 204 at 226 (U.S. 1821). "Within the realm of legislative discretion, the exercise of good taste and good judgment in the examination of witnesses must be entrusted to those who have been vested with authority to conduct such investigations." *Townsend* v. *United States*, 95 F. 2d 352 at 361 (D.C. Cir. 1938), cert. denied 303 U.S. 664, 58 S. Ct. 830, 82 L. ed. 1121 (1938). "The courts have no authority to speak or act upon the conduct by the legislative branch of its own business, so long as the bounds of power and pertinency are not exceeded . . ." *Barsky* v. *United States*, 167 F. 2d 241 at 250 (D.C. Cir. 1948), cert. denied 334 U.S. 843, 68 S. Ct. 1511, 92 L. ed. 1767 (1948).

50. Voorhis, "Congressional Investigations: Inner Workings", 18 *U. Chi. L. Rev.* 65 at 456, 460, 462 (1951).

51. *Christoffel* v. *United States*, 338 U.S. 84, 69 S. Ct. 1447, 93 L. ed. 1826 (1949), reversing conviction for perjury. See comments in *United States* v. *Bryan*, 339 U.S. 323 at 329, 70 S. Ct. 724, 94 L. ed. 884 (1950).

52. A set of committee rules for curbing one-man hearings was publicly suggested by the Chairman of the Republican Policy Committee of the Senate, *New York Times*, March 11, 1953, page 19, column 1, after two committee chairmen individually had used particularly unreasonable tactics within a few days of each other. One incident concerned a distinguished Army general and the other, the presidential nominee for the Chief Justiceship of the Supreme Court. Official support for such restrictive measures may dwindle because of the improbability that future attacks of this nature will be aimed at such well-supported targets, or, if so, will occur simultaneously. Opposing pressure comes from the volume of congressional activity and the popularity of dynamic individualism in American politics.

53. ". . . the courts of the United States could not emulate the committee's example and maintain even a semblance of fair and dispassionate conduct of trials in criminal cases." Stated with reference to the Senate committee investigating organized crime, *Aiuppa* v. *United States*, 201 F. 2d 287 at 300 (6th Cir. 1952).

54. *United States* v. *Kleinman*, 107 F. Supp. 407 (D. Col. 1952).

55. *Townsend* v. *United States*, 95 F. 2d 352 at 361 (D.C. Cir. 1938), cert. denied 303 U.S. 664, 58 S. Ct. 830, 82 L. ed. 1121 (1938). (Emphasis by the Court.)

56. *Bart* v. *United States*, 203 F. 2d 45 at 50 (D.C. Cir. 1952).

57. *Henry* v. *Henkel*, 235 U.S. 219, 35 S. Ct. 54, 59 L. ed. 203 (1914). Other Supreme Court opinions concerning *habeas corpus* applications by witness include *In re Chapman*, 166 U.S. 661, 17 S. Ct. 677, 41 L. ed. 1154 (1897); *Marshall* v. *Gordon*, 243 U.S. 521, 37 S. Ct. 448, 61 L. ed. 881 (1917); *Barry* v. *Cunningham*, 279 U.S. 597, 49 S. Ct. 452, 73 L. ed. 867 (1929); and *Jurney* v. *MacCracken*, 294 U.S. 125, 55 S. Ct. 375, 79 L. ed. 802 (1935).

some opinions may have resulted in part from special circumstances. These include: (1) the need for treating issues broadly in proceedings for *habeas corpus* proceedings,[57] (2) the need for viewing performance prospectively in some landmark cases,[58] and (3) the "omnibus" defense raised by certain witnesses who refused to testify at hearings on subversive activities.[59] These special circumstances, however, have probably been less significant than (1) the broad meaning given the term "legislative", (2) the emphasis upon purpose, rather than performance, and (3) the non-reviewability of general performance.

The efforts of witnesses to limit the broad scope of the investigating power by invoking the rights or privileges specified in the Federal Bill of Rights have been largely in vain except with respect to the privilege against incrimination.

First Amendment Not a Decisive Factor

The guaranty of free expression in the First Amendment has been raised many times but has not been the decisive factor in any Supreme Court case. Its influence was not far away in the *Rumely* opinion[60] where a resolution authorizing a study of "lobbying activities" was held not to permit a request for general book distribution lists from an association interested in constitutional government. The Court acknowledged that the interpretation was "in the candid service of avoiding a serious constitutional doubt[61]." Two Justices who believed that a second resolution was evidence of a wider authority placed the result upon the First Amendment itself, stating that when "the government can demand of a publisher the names of the purchasers of his publications, the free press as we know it disappears[62]."

The guaranty of free speech has been held not to bar inquiries into Communist Party affiliation or activity.[63] One witness argued before the Court of Appeals for the District of Columbia Circuit that forced disclosure reacts unfavorably upon willingness to speak and hence infringes free speech. Even when this reaction was assumed to have a restrictive effect upon expression, the Court held the guaranties of the First Amendment to be secondary to the need of the Government to protect itself from subversive activity.[64]

Remarks of the Supreme Court in the *Kilbourn*[65], *Daugherty*[66] and *Sinclair*[67] opinions might give the impression that a "right of privacy" restricts the power of inquiry. It is doubtful however whether regard for privacy has been anything more than peripheral influence, even in the *Kilbourn* case. The "right of privacy" there as elsewhere began where authority left off. The Court has said that there is no "general" right to inquire into private affairs but it has never denied the power to invade privacy to the full extent of the necessities of a legitimate objective declared by Congress. Nowhere has this necessity been forced to compromise with privacy.[68]

Decisions concerning committee hearings have been little affected by the guaranties in the Fourth Amendment against unreasonable searches and seizures[69] and inadequately supported warrants[70] although the former may have indirectly restrained "fishing expeditions" by administrative agencies.[71]

The privilege against self-incrim-

58. *McGrain* v. *Daugherty*, 273 U.S. 135 at 175, 176, 47 S. Ct. 319, 71 L. ed. 580 (1927), where the Court assumed for present purposes that there would be no abuse of power. In *Barry* v. *Cunningham*, 279 U.S. 597, 49 S. Ct. 452, 73 L. ed. 867 (1929), the theory of the case required the assumption that performance was prospective although the witness already had appeared. In the Sinclair case, where a conviction was upheld, the court cast doubt upon the applicability of the presumption of regularity and stated that "the stronger presumption of innocence attended the accused at the trial", *Sinclair* v. *United States*, 279 U.S. 263 at 296, 49 S. Ct. 268, 73 L. ed. 692 (1929). The Court of Appeals for the District of Columbia Circuit has stated that "potentiality is the measure of power of inquiry", *Barsky* v. *United States*, 167 F. 2d 241 at 245 (D.C. Cir. 1948), cert. denied 334 U.S. 843, 68 S. Ct. 1511, 92 L. ed. 1767 (1948).

59. *Barsky* v. *United States*, 167 F. 2d 241 (D.C. 1948), cert. denied, 334 U.S. 843, 68 S. Ct. 1511, 92 L. ed. 1767 (1948). The Court cites various types of precedents and even mentions the doctrine of the absolute immunity of public officials from damage suits in upholding a conviction of a witness. *Id.* at 245. See also *United States* v. *Josephson*, 165 F. 2d 82 (2d Cir. 1947), cert. denied 333 U.S. 838, 68 S. Ct. 609, 92 L. ed. 1122 (1948).

60. *United States* v. *Rumely*, 345 U.S. 41, 73 S. Ct. 543, 97 L. ed. 770 (1953). Similarly, *United States* v. *Patterson*, 206 F. 2d 433 (D.C. Cir. 1953).

61. *Id.* at 47.

62. *Id.* at 57.

63. *Lawson* v. *United States*, 176 F. 2d 49 (D.C. Cir. 1949), cert. denied 339 U.S. 934, 70 S. Ct. 663, 94 L. ed. 1352 (1950); *United States* v. *Emspak*, 203 F. 2d 54 (D.C. Cir. 1952), cert. granted, October 12, 1953, 22 U.S. Law Week 3030.

64. *Barsky* v. *United States*, 167 F. 2d 241 (D.C. Cir. 1948), cert. denied 334 U.S. 843, 68 S. Ct. 1511, 92 L. ed. 1767 (1948).

65. ". . . we are sure that no person can be punished for contumacy as a witness before either House, unless his testimony is required in a matter into which that House has jurisdiction to inquire, and we feel equally sure that neither of these bodies possesses the general power of making inquiry into the private affairs of the citizen." *Kilbourn* v. *Thompson*, 103 U.S. 168 at 190, 26 L. ed. 377 (1880).

66. ". . . neither house is invested with 'general' power to inquire into private affairs and compel disclosure, but only with such limited power of inquiry as is shown to exist when the rule of constitutional interpretation just stated is rightly applied." *McGrain* v. *Daugherty*, 273 U.S. 135, at 173, 174, 47 S. Ct. 319, 71 L. ed. 580 (1927).

67. "It has always been recognized in this country, and it is well to remember, that few if any of the rights of the people guarded by fundamental law are of greater importance to their happiness and safety than the right to be exempt from all unauthorized, arbitrary or unreasonable inquiries and disclosures in respect of their personal and private affairs." *Sinclair* v. *United States*, 279 U.S. 263 at 292, 49 S. Ct. 268, 73 L. ed. 692 (1929).

The Court of Appeals for the District of Columbia Circuit recognized a "freedom to remain silent" or "freedom of privacy" distinct from freedom of speech. It was premised upon the individual's right to the pursuit of happiness. The question at issue (concerning Communist Party affiliation) was found proper, even assuming that it "would impinge upon speech and not merely invade privacy". *Barsky* v. *United States*, 167 F. 2d 241, 249, 250 (D.C. Cir. 1948), cert. denied, 334 U.S. 843, 68 S. Ct. 1511, 92 L. ed. 1767 (1948).

68. Both the *Daugherty* and *Sinclair* decisions were adverse to the witnesses. Similarly, *In re Chapman*, 166 U.S. 661, 17 S. Ct. 677, 41 L. ed. 1154 (1897), and *Henry* v. *Henkel*, 235 U.S. 219, 35 Sup. Ct. 54, 59 L. ed. 203 (1914). The latter, concerned a refusal to disclose names of national bank officials who had received shares in trading syndicates.

69. *Kilbourn* v. *Thompson*, 103 U.S. 168, 26 L. ed. 377 (1880), reference in argument for plaintiff, at 178; *Sinclair* v. *United States*, 279 at 263, 49 S. Ct. 268, 73 L. ed. 692 (1929), plaintiff argument at 266, 267; *In re Chapman*, 166 U.S. 661, 17 S. Ct. 677, 41 L. ed. 1154 (1897), held there had been no violation of the search and seizure portion of the Fourth Amendment.

70. *Anderson* v. *Dunn*, 6 Wheat. 204 at 234 (U.S. 1821); *McGrain* v. *Daugherty*, 273 U.S. 135 at 156, 158, 47 S. Ct. 319, 71 L. ed. 580 (1927). In *Ex parte Frankfeld*, 32 F. Supp. 915 (D. Col. 1940) a witness under indictment for refusing to answer questions obtained his release on *habeas corpus* because the warrant of arrest had been signed by only the secretary for the committee.

71. "We cannot attribute to Congress an intent to defy the Fourth Amendment or even to come so near to doing so as to raise a serious question of Constitutional law" *Federal Trade Commission* v. *American Tobacco Co.*, 264 U.S. 298 at 307, 44 S. Ct. 336, 68 L. ed. 696 (1924). For a statement of the limits upon the "canons of avoidance of constitutional doubts" see *Shapiro* v. *United States*, 335 U.S. 1 at 31, 68 S. Ct. 1375, 92 L. ed. 1787 (1948).

ination in the Fifth Amendment has been by far the most successful defense raised by witnesses.[72] For those who appeared before the Senate Committee investigating organized crime three years ago it has proved a sure defense if clearly and timely raised. The Court of Appeals for the Fifth Circuit ordered a judgment of acquittal for one witness who, after giving his name and address, had refused to answer 166 questions. The Court stated that "while the appellant was compelled to take the stand as an ordinary witness, his actual status was markedly similar to that of an accused in a criminal trial[73]."

The use of the privilege in investigations of subversive activities against questions of Communist Party affiliation and activities has been upheld in district court opinions.[74] A question of intent has arisen from the use of the words "First Amendment, supplemented by the Fifth" because the due process clause and not the privilege against incrimination seems closer to the First Amendment. The Supreme Court is now considering an appellate decision which held that the words did not raise the privilege.[75] Differences also have arisen concerning waiver.[76]

The extensive use of the privilege in recent years has led to proposals that each House be authorized to grant witnesses immunity from prosecution where the information being withheld is considered of greater importance. In several other situations, such as hearings by the Federal Trade Commission, existing statutes provide that no persons may be prosecuted on account of any transaction, matter or thing concerning which he may testify under compulsion after claiming the privilege against incrimination.[77] An old statute does provide that testimony before a congressional committee may not be used as evidence in a criminal proceeding,[78] but this type of immunity statute was held to be an inadequate substitute for the privilege and a witness need not testify when it is offered.[79] The statute has some one-sided effect, however. The Supreme Court this year held that testimony before a Senate committee investigating crime was improperly used in a state criminal proceeding.[80] The fact that the privilege had not been claimed was deemed unimportant because the statute is unconditional in its terms. A bill passed by the Senate provides for the broader type of immunity upon majority vote of the respective house, or, if the Attorney General has as-

72. Each of the following decisions was favorable to the witness on the matter of the privilege: (a) Concerning Senate Crime committee investigating organized crime in interstate commerce, *Poretto* v. *United States*, 196 F. 2d 392 (5th Cir. 1952); *Marcello* v. *United States*, 196 F. 2d 437 (5th Cir. 1952); *Aiuppa* v. *United States*, 201 F. 2d 287 (6th Cir. 1952); *United States* v. *Cohen*, 101 F. Supp. 906 (N.D. Calif. 1952); *United States* v. *DiCarlo*, 102 F. Supp. 597 (N.D. Ohio 1952); *United States* v. *Licavoli*, 102 F. Supp. 607 (N.D. Ohio 1952); *United States* v. *Fischetti*, 103 F. Supp. 797 (D. Col. 1952). (b) Concerning committees investigating subversive activities. *United States* v. *Rosen*, 174 F. 2d 187 (2d Cir. 1949), cert. denied 338 U.S. 851, 70 S. Ct. 87, 94 L. ed. 521 (1949); *Quinn* v. *United States*, 203 F. 2d 20 (D.C. Cir. 1952); *United States* v. *Fitzpatrick*, 96 F. Supp. 491 (D. Col. 1951); *United States* v. *Raley*, 96 F. Supp. 495 (D. Col. 1951); *United States* v. *Nelson*, 103 F. Supp. 215 (D. Col. 1952); *United States* v. *Jaffe*, 98 F. Supp. 191 (D. Col. 1951).

73. *Marcello* v. *United States*, 196 F. 2d 437 at 441 (5th Cir. 1952).

74. *United States* v. *Jaffe*, 98 F. Supp. 191 (D. Col. 1951). The Supreme Court upheld the privilege in *Blau* v. *United States*, 340 U.S. 159, 71 S. Ct. 223, 95 L. ed. 170 (1950), concerning questions before a grand jury of employment by the party. See *Dennis* v. *United States*, 341 U.S. 494, 71 Sup. Ct. 857, 97 L. ed. 1137 (1951), concerning conviction under the Smith Act, 54 Stat. 670 (1941), 18 U.S.C. 2385 (1946).

75. *United States* v. *Emspak*, 203 F. 2d 54 (D.C. Cir. 1952), cert. granted, Oct. 12, 1953, 22 U.S. Law Week 3081; but see *Quinn* v. *United States*, 203 F. 2d 20 (D.C. Cir. 1952).

76. A district court decision that an admission of being a "well-known Communist" did not waive the privilege with respect to "details of his activities within the Party and his associations with other alleged members", *United States* v. *Nelson*, 103 F. Supp. 215 at 217 (D. Col. 1952) is difficult to reconcile with the Supreme Court holding that admission before a grand jury of having been an official of the party waives the privilege on the identity of the successor, *Rogers* v. *United States*, 340 U.S. 367, 71 S. Ct. 438, 95 L. ed. 344 (1951).

77. 38 Stat. 722, 723(1914), 15 U.S.C. §49(1946).

78. "No testimony given by a witness before either House, or before any committee of either House . . . shall be used as evidence in any criminal proceeding against him in any court, except in a prosecution for perjury committed in giving such testimony. But an official paper or record produced by him is not within the said privilege." 62 Stat. 833 (1948), 18 U.S.C. §3486 (1946). The provision was first enacted in 1857 and amended in 1862.

79. *Counselman* v. *Hitchcock*, 142 U.S. 547, 12 S. Ct. 195, 35 L. ed. 1110 (1892).

80. *Adams* v. *Maryland*, 347 U.S. 179, 74 S. Ct. 442 (1954).

sented, by two-thirds vote of the committee, including two members of each political party.[81] The possession of such right by the houses of Congress seems compatible with the theory that the investigating power is needed to obtain information.[82]

Sixth Amendment Is Not Applicable

The Sixth Amendment expressly applies to "criminal prosecutions" and is hence not applicable to legislation hearings. The pseudo-punitive character of the more publicized inquiries of the past few years, however, has led to suggestions[83] that persons accused in the course of congressional hearings be accorded rights or privileges similar to those in the Sixth Amendment, such as the right to information of accusation, confrontation of accusing witnesses, compulsory process for obtaining witnesses in his own behalf, and the assistance of counsel. The rights to information, to counsel and to introduce statements of defense or explanation are afforded by many committees in varying degrees[84] but it is contended that allowing others to cross-examine witnesses or to name rebuttal witnesses would seriously interfere with committee progress. There may be merit in that argument, but does it not indicate that Congress may have gone beyond the necessities of the situation? If it has not the time for the precautions long established as a means of assuring the correctness of accusations or allegations, should it accept them as information on which to base legislative action?

In conclusion, it is clear that the investigating power of Congress is well established and that it is exercised with less than the customary amount of legal and judicial control. Its existence rests upon declared purpose—largely a formal requirement—and its scope is exceptionally broad. It extends to whatever is pertinent to the matter under inquiry. The witness who refuses to answer does so at his peril and risks conviction if he is mistaken, whatever the reason. The constitutional guaranties of individual rights have had little restraining effect except for the privilege against self-incrimination. Even it may not have lessened the conflict between public need and individual interest because its use has come to be regarded as a self-accusation which in many respects is as damaging as prosecution itself.

Added to the breadth of the investigating power is the disturbing manner in which it is sometimes used. This has been front-page news for months, and it may suffice here merely to refer to the numerous proposals for "fair play" codes, previously mentioned. In brief, they recommend: (1) privileges similar to those accorded defendants in criminal cases, (2) control of publicity releases concerning individuals, and (3) restraints upon congressional individualism. The need for the first and perhaps the second arises mainly from the fact that many persons being called before committees are not merely witnesses, as the theory of the investigating power assumes, but suspected wrong-doers. This raises again the question of whether some committees are endeavoring to engage in law enforcement as well as (or instead of) law-making activities.

Inasmuch as the current controversy concerns a few committees, it may be that congressional individualism is the principal source of difficulty. This intensifies the problem but also narrows it, and Congress usually is reluctant to impose restrictive rules out of concern for other committees if not for fellow legislators. Moreover, individualism has two sides. At times it reaches highly distasteful extremes, but in its usual form it may be responsible for the vitality and the breadth of responsiveness in the American political system. Eliminating extreme expressions without damaging an institution itself is usually a delicate as well as a challenging operation.

The reconciliation of public need and individual rights in any area is a slow and often discouraging process. This is especially so when primary responsibility rests with the legislature which by nature is more concerned with majority will than with individual interest. In the field of investigations some progress has been made, however. Congress gradually has adopted a number of legal processes and the courts have had more and more opportunity to pass judgment on phases of the investigative activity. Much remains nevertheless in an unpredictable state. In the search for sound means of extending the influence of legal and judicial methods, the most striking fact observed is the failure of both the courts and Congress to utilize fully the principal instrument of control—the committee authorization. The courts have allowed the requirement of a statement of legitimate objective to become a formality and the control of the investigating power is clouded by a vague concept of what is legislative and an unwillingness to pierce declared purpose. As a result congressional hearings have moved unrestrained into areas overlapping law enforcement where justice can be done only by introducing the more deliberate procedures of judicial administration.

When a governmental process reaches the point where justice cannot be reconciled with progress, it is time to go look to fundamentals. The basic principle upon which the investigating power rests is the need of

81. Cong. Rec. July 9, 1953, page 8663.

82. The other portions of the Fifth Amendment have had little consideration. The due process clause has not entered into judicial review of investigations. On double jeopardy, see *In re Chapman*, 166 U.S. 661, 17 S. Ct. 677, 41 L. ed. 1154 (1897). The grand jury provisions of the Fifth Amendment present no problem because the statute requires presentment. 52 Stat. 943 (1938), 2 U.S.C. §194 (1946).

83. See Congressman Keating "Code of Congressional Inquiries", *New York Times*, April 5, 1953, §IV, page 10, Column 1; Galloway, "Congressional Investigations—Proposed Reforms", 18 *U. of Chi. L. Rev.*, 478-502 (1951), which analyzes sixteen proposed codes of procedure and lists from these forty-one different "safeguards". See also Congressman Javits, "For a Joint Committee on Subversion", *New York Times*, February 28, 1954, §IV, page 10; discussion of reform has increased during recent months, see *New York Times*, March 15, 1954; page 1, Column 7.

84. Congressman Keating "Code of Congressional Inquiries", *New York Times*, April 5, 1953, §IV, page 10.

information for legislative action. Necessity then is the primary determinant. Nothing necessary should be denied; nothing unnecessary need be allowed. The committee authorization is the key to the existence and the scope of the investigating power. It should more fully and more specifically spell out what is necessary. And the courts should be more willing to review actual performance in relation to the stated necessities.

Much of the present controversy may result from a lack of agreement on what is really necessary. A more definitive statement of congressional needs might reduce the debatable area. Court opinions indicate a substantially different attitude toward cases involving subversive activities. If investigations of this nature do belong in a special category and do require unusual procedures, a clear statement to that effect with supporting data probably would eliminate much of the prevailing criticism. In a similar manner, the various types of investigations—informative, surveillance, and exposure—should be recognized in their own right because their necessities differ. The present tendency of justifying virtually everything under a vague concept of the term "legislative" is not conducive to the development by the courts or the committees of standards which might improve performance. A more precise and comprehensive statement by Congress of what is necessary in the particular situation and a more penetrating analysis by the courts of what actually takes place in relation to the specific necessities would seem to be primary requirements for placing congressional investigations on a fairer and more efficient basis.

American Courts in Germany

(Continued from page 1045)

simultaneously with currency reform and was a measure directed against Western Germany and Berlin as well as the Western Allies. The result was a unifying influence between the Western powers and the German people.

As the Cold War developed and became more intense, the trend of our criminal cases changed to the prosecution of those criminal violations inspired by the East affecting the economic, political and physical security of ourselves and Western Europe. We had had practically no instances of espionage, sabotage or organized resistance from the remnants of the Nazi die-hards. When the Cold War began, these cases developed in ever-increasing number. The irony is that these offenses were inspired and instigated not by the former enemy but by a former ally!

The commonest pattern of espionage in our Area of Control is the border-crossing agent who enters illegally from Czechoslovakia into the Western Zone of Germany to gather information on military installations, troop strength, composition and capabilities of units, location of airfields, maps and diagrams of the installations, types and numbers of planes, gasoline storage and other military information. Another type of information sought by these espionage agents concerns refugees who have fled from behind the Iron Curtain and the Displaced Persons who have relatives behind the Curtain. These persons are subjected to harassment by the Communist agents who would seek to impress them into their cause. Agents have attempted to infiltrate every part of our forces, even the intelligence service. Our United States Army Counter Intelligence Corps (CIC) has been most effective in detecting and bringing these spies to justice.

The law most commonly violated is Allied High Commission Law No. 14.[18] Article 1, Section 2 of that law

18. "AHC Law No. 14 'Offenses Against the Interests of the Occupation'.

Article 1:

The following offenses are punishable by the penalties specified in one or both of the following clauses: a. death or imprisonment for a term of any duration, including life imprisonment; b. fine not exceeding DM 50,000.

1. Espionage committed in order to prejudice the security or interests of the Occupation Authorities or Occupation Forces;

2. Unauthorized communication of information which may be dangerous to the security of property of the Allied Forces; unauthorized possession of such information without promptly reporting it to the Occupation authorities;

3. Sabotage in any form committed for the purpose of interfering with or obstructing the Allied Forces in carrying on their functions or missions;

4. Armed attack on or armed resistance to the Allied Forces;

5. Assault on any member of the Allied Forces causing death or permanent disability.

Article 2:

The following offenses are punishable by the penalties specified in one or both of the following clauses: a. imprisonment for a term not exceeding ten years; b. fine not exceeding DM 50,000:

1. Endeavouring to obtain, without authority, information the disclosure of which is likely to be prejudicial to the security or interests of the Occupation Authorities or Occupation Forces. . . ."

provides a penalty of death or imprisonment of any duration for espionage, sabotage and the unauthorized communication of information which may be dangerous to the security of the Allied Forces. Section 1 of Article 2 of said law covers a violation more common than the above sections. There a penalty of not to exceed ten years' imprisonment and/or a fine of DM 50,000 is provided for endeavoring to obtain without authority information the disclosure of which is likely to be prejudicial to the security or interests of the occupational authorities or forces.

One of the most brazen acts of sabotage was filling with cement the demolition chambers of bridge approaches in the north of Hesse by four Communist youths in 1951. The four were in their 20's and members of the FDJ, a Communist Party youth organization. They are presently serving extended prison sentences.

A category of economic offenses, Communist inspired and organized, is violation of custom laws regarding shipment of coffee, cigarettes, nylons and other luxury items out of the East Sector of Berlin into the Western Zone of Germany. In return the Russians then seek ball bearings, machine tools and other items to add to their war machine. This type of economic warfare on the part of the Russians works a dual purpose. It undermines the German economy by bringing in tax-evaded luxury items and gives the Russians the needed implements of war.

One of the biggest cases of this type tried in our courts was the case of the Czechoslovakian superagent Gustav Davidovic[19] who was responsible for the routing of hundreds of thousands of dollars worth of machine tools out of Western Germany into the orbit behind the Iron Curtain before he was apprehended. He is presently serving a seven-year sentence for his efforts. His only defense was that he was forced to commit the acts because his family were held as hostages.

By far the greatest number of cases incident to the Cold War are the "Acts hostile to the Allied Forces", punishable by a prison term of not more than one year and/or a fine not to exceed DM 5000. From the amount and variety of posters and pamphlets we have confiscated vilifying France, England and the United States which have been smuggled into the Western Zone of Germany and then distributed, one wonders if there is any paper left behind the Iron Curtain. I am sure that tons of it have been devoted to the telling of the alleged horrendous stories of atrocities committed by our American soldiers in Korea. The Communists hit upon this device of creating hatred for the American Forces in Germany after we had been successful in putting a stop to their direct attack upon our Forces here.

The case of Lilli Waechter was a case of this nature.[20] This case involved a German housewife who claimed to have visited Korea and obtained first-hand information of the atrocities committed there by American soldiers. She appeared at two public meetings under the auspices of Communist-front organizations where she related her atrocity stories. She was convicted, and on appeal the Court of Appeals held that even though the Allied Occupation Forces were not mentioned as such in her speeches, she nevertheless was committing acts hostile to those forces by repeating the stories of atrocities committed in Korea, for her objective was to create hostility against the Allied Forces in Germany by spreading such propaganda.

The misguided youth caught painting "Ami go home" signs on stone walls and the lesser Communist Party member apprehended distributing pamphlets are usually given a reprimand which in most cases is sufficient to deter their further activity. However, the party organizers and the repeaters responsible for the dissemination of the false, slanderous and hostile material are dealt with more severely.

There has been a decided decline of this latter type of offense, partly due to our prosecution and partly to the fact that the Communist activity is presently devoted to propaganda against the Adenauer government. They tried by every means possible to keep Western Germany from entering EDC and from ratifying the Contractual Agreement with England, France and the United States.

With the ratification of the Contractual Agreement, and a few months thereafter in which to clear our dockets, the mission of the U. S. Courts will have been completed and the German courts will have full jurisdiction over all cases except those criminal cases involving members of the Allied Forces stationed in Germany as defense troops, American civilians serving with the Army and the dependents of these two. The U. S. Army will retain jurisdiction over these last named persons.

Looking back over these 600,000 cases and what imprint, if any, the United States court system and procedure has had upon the German people, calls for certain conclusions.

The German police system is capable and aggressive. Most of these cases have been apprehended, investigated and handled through the German police. The co-operation we have received from them, the German district attorney's office and their courts, has been excellent.

The German courts following the Continental procedure are most efficient. I have no doubt that the police, the state's attorneys and the courts can and will amply protect not only the German state, but also our defense forces stationed here after our occupational courts are finished.

What concerns us more is, "Have we made a contribution to the new democratic Germany by the methods used in handling these 600,000 cases?" Only time can tell. I firmly believe that our administration of justice and the prosecution of these cases under American procedure will leave an impact of American free-

19. *Office of the United States High Commissioner for Germany v. Davidovic*, C.A.R. Op. 780.
20. *Office of the United States High Commissioner for Germany v. Waechter*, C.A.R. Opinion No. 755.

dom that can not be easily erased.

The German attorneys who have practiced before our courts will never again be satisfied to take a mute role beneath the podium and see the German Staatsanwalt (state's attorney) sitting with the judges. Nor will these 600,000 people who have been given the safeguards for the protection of their rights under American procedure soon forget that they were not compelled to testify, that they were not convicted upon hearsay evidence, that they were convicted beyond a reasonable doubt and that they were presumed to be innocent until they were proved guilty.

At the outset of the occupation, there was much debate as to whether or not we could give all of the safeguards to the individual in occupied territory and under a state of war which are present in our own American civilian courts. Many wondered if we should not follow the Continental procedural system as a more practical method. It was decided that by example we could show one democratic institution, namely our courts, in operation *even* in occupied territory. Our experience has more than justified the risk. I shall always remember the comments of a Bavarian lawyer who, after practicing before our courts from 1945 to 1946, remarked:

> While the sentences given by American courts of the occupation are sometimes higher than those given by the German courts for similar offenses, the rights of the individual are better protected in the American courts of the occupation than they have ever been by the German courts, even before the Nazi days.

This is something of which we can be proud and which I am sure the German people will not soon forget.

The Lawyer and Capitalism

(Continued from page 1072)

One of the kindly women in charge of the work is quoted as saying to the reporter: "It's a trial sometimes. Some of these people are 50 years old and still have to be told like children what to do. That's how they lived in the old country. They were never encouraged to use their own ingenuity or imagination."

In this wholly sincere and artless comment, we have the ultimate test that must be faced by every government before the judgment of humanity and of God: Did it encourage and inspire its people individually to use their own initiative and imagination, to develop their own capacities and to be self-reliant and self-sustained?

XI

A ninth fraud in the red conspirators' design, probably not a self-deception except to a duped contingent, is a propaganda piece that has been assimilated by a number of teachers, professors, clergymen and young people right here in the U.S.A. It consists of the two clichés that "capitalism has failed" and "capitalism is doomed". We ought to recognize the promotion of these ideas as a master stroke of propaganda-psychology. They are at the heart of every communist message in schoolbook, on campus, to labor union, or elsewhere.

Insofar as these slogans are an unconscious projection of what the red conspirator deeply knows about his own brand of capitalism (in the manner that a dishonest person unconsciously projects his dishonesty upon others), they, no doubt, speak truthfully. The monopolistic capitalism of socialism is a demonstrated failure and may reasonably be regarded as doomed whenever installed. It might be more appropriate to say that under it the normal development of the human mind and spirit is doomed.

If you will try to learn from anyone who appears to have imbibed the ambiguous watchword that capitalism has failed, or who parrots the cliché, just what he means by it, you will have great difficulty. Your attention may be directed to poverty, hunger, disease, illiteracy, mistreatment of employees by employers, mistreatment of tenants by landlords, and other undesirable conditions existing in countries where the private ownership of property has existed. (You probably will not be told of the mistreatment of employers by employees or of landlords by tenants.) But many other factors also are concomitants of such unfortunate conditions, and nothing is proved as to cause and effect simply by the fact of coexistence. The stark truth that confronts us in all history

and everywhere is that *people* have failed (not all people, not the species as such, but many), failed to measure up to ideals we now entertain, failed under every system, every kind of government, every kind of regime. (Also, let it be noted appreciatingly that numerous persons have succeeded wondrously.) Three facts that Utopians seem never able to grasp are: (1) that *people,* not gods, will have to work the social, economic, political and physical machinery the Utopians intend to construct; (2) reasonably good sense requires that societies, regimes and governments be judged *comparatively* before we choose one from the others, and not by an absolute, idealistic criterion, against which all will be found wanting; and (3) the folly of destroying the sound, demonstrated values of a regime, merely because people, being people, cannot and will not gain or receive equal benefits under it or under any scheme that the human mind can imagine.

What the red agitator really says when he tells us that capitalism has failed is this: "The private ownership of property has failed; therefore, help a few of us to seize, own and control all property; we will liquidate the people who have owned it in the past, regardless of the industry and qualities of character by which they came into such ownership; we will manage the property—and manage you—better than they did. Not only let us have the property, but surrender to us your freedom, and your reward will be that we will take care of you from the cradle to the grave." The deal needs only to be stated frankly to reveal its own absurdity and to draw the repugnance of every sane person of moderate or greater intelligence, imbued with a normal sense of justice.

As has been indicated already in this treatise, except for such spiritual understanding as man has gained and the warmth and enlightenment that have radiated from men of spiritual understanding, nothing connected with our mysterious journey on this planet has done so much to help so many people succeed, and to express themselves helpfully to society and gratifyingly to themselves, as the private ownership of property, and open and competitive capitalism. In productive capacity and in originality, variety and economy of production, no social, economic or political regime in all history can stand comparison with the achievements of our own people under our kind of capitalism.

As for the future, everything depends on the wisdom and character of our people. If we are to give a growing population what it wants in material goods and care; if we are to resist the terrific pressures for a super-state, or to yield to those pressures without loss of freedom or of productive capacity; if we are to sustain the deceptions, incompetency and waste induced from human nature by a state-care-for-all regime; it may become necessary to abandon our primitive monetary system, now a millstone about our neck, and in spite of which the tremendous drive of our open and competitive capitalism has achieved its unparalleled successes.

XII

There have been persons, a few of them distinguished, who, in sincere and Christian-like concern for humanity, have been socialists of one degree or another. But the current movement for monopoly which is called communism is an offspring not of love and enlightenment, but of hate, envy, lust, vandalism and ignorance. Its specious dialectics and its motives require the atheism that accompanies it. By its atheism it makes man the supreme being of this corner of the universe, and it fortifies the position of any particular man as sovereign who can so establish himself by cunning and might. Thus it releases men from responsibility to a higher intelligence and from any reason for obedience to natural or moral law. And thus it authorizes dishonesty, theft, cruelty, murder and aggressive war to serve its ends. After a human mind has been contorted into the malformed framework of these falsehoods, its whole view of life is distorted. A mind cannot be pressed into such a misshapen mold and see facts, feel intangible factors, or think, as normal persons do.

Communist proselyting has two appeals which are denied to both democracy and competitive and open capitalism. The first is to the gangster spirit which lingers dormant in much of humanity. In normal American boyhood, that spirit works itself off in the playing of "Cops and Robbers", cowboys, American Indians, the villains of the early West, pirates and their caves, bandits and their hide-outs, and similar imaginative adventures. Some of our intellectuals, real and pseudo, never had such boyhood experiences, and the gangster in them waited the furtive appeal of the red plotter. He invited them into the most ambitious gangster movement in history. The second appeal is to ignorance of those truths that can be learned only from intelligent and honest consideration of practical dealings with people and human affairs. The greater the ignorance, the stronger the appeal.

For democracy or our kind of capitalism to use either of those appeals would be to court disaster, for the ultimate success of both is conditioned upon the prevalence within the structure of a high degree of intelligence, understanding, practical judgment, and integrity.

XIII

What has been the relationship of

the American lawyer to our system of open and competitive capitalism and to its conflict with the monopolistic, tyrannical capitalism of communism? The author, a lawyer, has not presumed in writing this article to state truths not already generally known by his fellows of the profession. It has been his hope, rather, to articulate the knowledge and thought of American lawyers, and thus to let all know that we have not been deceived by the stratagems of communism, that we have looked beneath its tinsel and its garish façades, and that we hold it in profound contempt.

In this we are proud of our record. We are disappointed that even a few lawyers have been communists, as, no doubt, a few have been. Although we shall do our best to see that any person charged with and denying such regression receives a fair trial, we shall not defend the regression. One communist lawyer in the United States is too many. We shall not cry about "witch-hunting", "red herrings", "academic freedom", "suppression of thought", or "abuse of constitutional rights" merely because a few members of our profession have been called before legislative committees to answer simple and clear questions about possible connection with the communist conspiracy. Neither shall we proclaim that because these events have taken place we have grown weak or fearful, and no longer dare speak our minds. Neither shall we please and encourage communist conspirators by joining reckless smear attacks against those who sincerely strive to expose subversive activities against us.

In addition to showing where we stand in relation to the world conflict between the two kinds of capitalism, this writing has had the purpose of proving the existence of facts disqualifying communists from the practice of law in this country, in addition to the red conspiracy's avowed objective of overthrowing our government by force. That fact certainly is reason enough, but it is not the only reason. This treatise, I believe, has expressed the understanding of nearly all lawyers of our land that no reconciliation between the ethics of the American legal profession and the beliefs, attitudes and practices of communists is possible. They are two opposite poles of thought and faith. Both cannot be trusted to serve the best interests of our country. A lawyer cannot sincerely subscribe to those ethics and at the same time lend support to the propagation of communism. He cannot without indefensible hypocrisy accept from our society one of its highest privileges and stations while harboring intentions to destroy the very traditions and values from which the privilege and station derive their significance.

Finally I am convinced that unless lawyers zealously dedicate themselves to the business of saving our regime of competitive and open capitalism, it will disappear from our beloved land in favor of monopolistic state capitalism, with all its paralyzing effects upon the human mind and spirit.

That dedication must transcend all petty politics, party lines, party interests, and all the cheap, ridiculous sophistries hurled in party conflict. Our profession is the only one that has had the training and experience in detecting deception, proving fraud, and fighting craftiness, to qualify it for leadership in the fight against the preparers of the red way. I believe that we owe this leadership to our country. Without claiming perfection in our system of capitalism, we know, appreciate and have received its many values. We know that under it we have not been the controlled hirelings of despots, but free men with immeasurable opportunities. We know that our profession has its life, vitality and self-respect within the ideological and tangible structures of such capitalism; that most of our employment derives from the myriad interests, projects and problems born of the imagination, daring and activities of such a regime; that our compensation has been paid from the capital of millions of capitalists, small and great; and that numerous members of our own profession have risen from poverty to distinguished positions of executive responsibility in the commercial world. We know that the world war being fought today for the control of the earth's material assets and for the control or freedom of men's minds is a life-and-death struggle between two kinds of capitalism: the worst kind, total monopoly in the hands of gangsters who call their system "communism"; and the best kind, open and competitive capitalism like that of the United States of America.

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